

**OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:	Case No.:	01-CA-263079
		01-CA-263108
		01-CA-264917
WHOLE FOODS MARKET SERVICES, INC.		01-CA-265183
Respondent		01-CA-266440
		01-CA-273840
And		04-CA-262738
		04-CA-263142
SAVANNAH KINZER, SUVERINO FRITH,		04-CA-264240
LYLA STYLES, ABDULAI BARRY, KIRBY BURT,		04-CA-264841
KAELEB CANDRILLI, LEEA MARY KELLY,		05-CA-264906
TRUMAN READ, HALEY EVANS, JUSTINE		05-CA-266403
O'NEILL, JOLINA CHRISTIE, SARITA WILSON,		10-CA-264875
CAMILE TUCKER-TOLBERT, CASSIDY VISCO,		19-CA-263263
YURI LONDON, ANA BELEN DEL RIO RAMIREZ		20-CA-264834
AND CHRISTOPHER MICHNO, as Individuals		25-CA-264904
Charging Party		32-CA-263226
		32-CA-266442

Place: Boston, MA
Date: 05/10/22
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FRITH, LEEA MARY KELLY, ANA BELEN: 05-CA-264906; 05-CA-266403
DEL RIO RAMIREZ, CAMILLE: 10-CA-264875; 19-CA-263263
TUCKER-TOLBERT, TRUMA READ,: 20-CA-264834; 25-CA-264904
ABDULAI BARRY, HALEY ASHLEY EVANS,: 32-CA-263226; 32-CA-266442
CASSIDY VISCO, JUSTINE O'NEILL,:
SARITA WILSON, LYLIA MARCELLA:
STYLES, YURI LONDON, SHANNON:
LISS-RIORDAN, CHRISTOPHER MICHNO,:
KIRBY BURT, and KAELEB RAE:
CANDRILL,:
As Individuals.:
-----:

The above-entitled matter came on for hearing
Pursuant to Notice, before Administrative Law Judge ARIEL
SOTOLONGO, at the National Labor Relations Board, Region 1,
Thomas P. O'Neill, Jr. Federal Building, Joseph Kane Hearing
Room, Room 690, 10 Causeway Street, Boston, Massachusetts, on
Tuesday, May 10, 2022 at 9:00 a.m.

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1 I N D E X

2 VOIR

3	WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS	DIRE
3	SCOTT DUNCAN	1109	1191	1229	--	1145
			1213			1185

4

5 E X H I B I T S
FOR IDENTIFICATION

IN EVIDENCE

6 EXHIBIT NUMBER
GENERAL COUNSEL'S

6	41	1199	1200
	43	1203	1205
7	44	1207	1208
	45	1194	1196
8	46	1210	1211

9 RESPONDENT'S

	23	--	1101
10	23A	1099	1101
	33	1098	1101
11	34	1101	1105
	35	1105	1106
12	36	1106	1107
	44	1140	1146
13	45	1181	1189

14 CHARGING PARTY'S

15	1	1222	1225 - Rejected
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P R O C E E D I N G S

(Time Noted: 9:11 a.m.)

JUDGE SOTOLONGO: All right. Let's go on the record.

All right. Good morning. It is now Tuesday, May the tenth. We're going to continue -- we're here this morning, and the Respondent -- the General Counsel rested his case here, in this section -- this part of the case yesterday, with the caveat that there's one more -- we have agreed that there's one more witness who did not -- or, could not testify yesterday for General Counsel, and there's supposed to be one witness for the Respondent that is on leave and will not be returning till a week from Friday. And therefore we have agreed as to those two witnesses who we're going to continue the case virtually.

So General Counsel will present one additional witness or may not. That's -- there's certain conditions they have to meet first, but assuming that's the case, we will hear, then, first from the General Counsel's witness when we resume virtually, whether it's sometime in the next week -- I'll let you decide which date. I'm pretty much open. Just let me know which day you choose.

And then, after we present the General Counsel's witness virtually, then we will have the Respondent's witness.

For today, the Respondent technically begins its case,

1 so -- and, Mr. Brown, Ms. Schaefer, are you ready to call
2 your first witness?

3 MR. BROWN: Judge, before we call our first witness,
4 we wanted to address the stipulation of authenticity at
5 least that we reached with counsel for the General Counsel
6 relating to the subpoenaed witnesses that we -- for
7 expediting the hearing purposes, we agreed at least as to
8 the authenticity of certain documents as to those
9 witnesses, I would like to mark those as Respondent's
10 exhibits and let Mr. Peterson make whatever objections
11 he'll make, and hopefully move this along. Yeah.

12 JUDGE SOTOLONGO: All right. Very well, let's -- then
13 again, let's proceed.

14 MR. BROWN: Thank you.

15 So the first document --

16 MS. SCHAEFER: This one first?

17 MR. BROWN: No, no, no, this one.

18 Is Respondent's 33.

19 JUDGE SOTOLONGO: Thirty-three -- let's see -- all
20 right. Thank you.

21 MR. BROWN: And Exhibit 23A as well.

22 THE REPORTER: We're having a hard time hearing you.

23 MR. BROWN: Yep. One second. Sorry.

24 And 23A. This is Respondent's 33.

25 (Respondent's Exhibit 33 marked for identification.)

1 MS. SCHAEFER: 23A for this one, which we're going to
2 add --

3 JUDGE SOTOLONGO: Is it 23 or 33?

4 MR. BROWN: Twenty --

5 MS. SCHAEFER: Twenty.

6 MR. BROWN: Twenty-three.

7 JUDGE SOTOLONGO: Twenty-three. Okay.

8 MS. SCHAEFER: It's good for the video that we tried
9 to introduce. There's a pending video that's 23. This is
10 the Facebook post representing --

11 MR. PETERSON: Oh, because it was --

12 MS. SCHAEFER: Yeah.

13 JUDGE SOTOLONGO: Okay. So this is 23A?

14 MS. SCHAEFER: Yeah.

15 (Respondent's Exhibit 23A marked for identification.)

16 MR. BROWN: So, Your Honor, for what I'm showing you
17 as Respondent's Exhibit 33 is a public Facebook post from a
18 team member -- Kaynaya Ryland -- who's a named
19 Discriminatee. There was testimony earlier in the hearing
20 about Ms. Ryland. She had a video that we -- that you've
21 reserved admission on, which is Respondent's 23.

22 JUDGE SOTOLONGO: Correct.

23 MR. BROWN: And what I have shown you is Respondent's
24 Exhibit 23A, which is the sort of paper representation of
25 the very first part of that video. And we believe these

1 further represent what the meaning of Black Lives Matter
2 meant for the team members at the River Street store at the
3 time. They're dated June 28th -- and the video, July 1st -
4 - at the protests at River Street. So for the Respondent,
5 we believe this is responsive, relevant to the General
6 Counsel's complaint. We'd move for its admission.

7 JUDGE SOTOLONGO: All right. Mr. Peterson?

8 MR. PETERSON: Yes, I was able to verify that these
9 are public posts, so no objections on the authenticity of
10 the exhibits. I would object on hearsay grounds to the
11 extent they're being offered for the truth of the matter
12 asserted, and relevance grounds as -- and cumulative nature
13 of the evidence, as there's been much testimony, there are
14 many reasons why the employees are wearing the Black Lives
15 Matter masks, and we don't see this as adding value to help
16 the decision-maker resolve the matters in this case.

17 JUDGE SOTOLONGO: All right. So just so I understand.
18 So you are offering both 23 and 23A.

19 MR. BROWN: We're offering 33 --

20 JUDGE SOTOLONGO: Thirty-three -- yeah, 33, right.

21 MR. BROWN: And 23A, and asking that 23A and the video
22 that relates to it be admitted into evidence.

23 And as to the argument about hearsay, I mean, the --
24 instead of having Ms. Ryland come and authenticate this,
25 that's why we are --

1 JUDGE SOTOLONGO: Okay. No, I understand. All right.
2 So there's no objection to its authenticity. And Mr.
3 Peterson, the General Counsel, has raised objections based
4 on relevance.

5 Well, I will admit them. How much weight I will give
6 this evidence is something I will decide. And, of course,
7 I am sure you will address that in your briefs. So
8 Respondent's 23, 23A and 33 are admitted.

9 MR. PETERSON: And, Your Honor, just so the record's
10 clear, the hearsay objection doesn't relate to the
11 authenticity but that the -- that anything is offered for
12 the truth of what's being asserted.

13 JUDGE SOTOLONGO: All right. So duly noted.

14 MR. PETERSON: Thank you.

15 (Respondent's Exhibit 23 admitted into evidence.)

16 (Respondent's Exhibit 23A admitted into evidence.)

17 (Respondent's Exhibit 33 admitted into evidence.)

18 MR. BROWN: Your Honor, I would like to show you a
19 document we're marking as Respondent's Exhibit 34.

20 (Respondent's Exhibit 34 marked for identification.)

21 JUDGE SOTOLONGO: All right.

22 MR. BROWN: It's a one-page document. It is a public
23 Facebook post from -- or, by a team member named Kelly
24 Ryan, who is a River Street team member. We subpoenaed Ms.
25 Ryan. She's an active -- a current team member at Whole

1 Foods. And in lieu of her coming to testify and
2 authenticate this one document, we have stipulated to its
3 authenticity, and we would ask that this be moved into
4 evidence as well.

5 JUDGE SOTOLONGO: I'm just taking a minute to read it
6 here.

7 This is posted by Ms. Ryan?

8 MR. BROWN: That's correct, Your Honor.

9 JUDGE SOTOLONGO: And Ms. Ryan is employee of the
10 store?

11 MR. BROWN: She is.

12 JUDGE SOTOLONGO: Well, here's my take on this. I
13 mean, obviously --

14 I mean, there's some -- there may not be a problem
15 with authenticity but, you know, now we're getting into the
16 individual opinions of individual employees who -- I take
17 it Ms. Ryan wasn't a part of the protests or part of the
18 group of employees that was wearing Black Lives Matter
19 masks.

20 MR. BROWN: She certainly was.

21 JUDGE SOTOLONGO: Oh, she was?

22 MR. BROWN: Yeah.

23 JUDGE SOTOLONGO: Oh.

24 MR. BROWN: And, Your Honor, the point is that she is
25 defining Black Lives Matter, and she, as a team member, is

1 talking about unjustly murdered Black people. On July 31st
2 of 2020. And posting a picture of the murals that we've
3 talked so much about. We think this goes to yet more
4 evidence of what the purpose and meaning of Black Lives
5 Matter on their masks meant. And that's why we would like
6 this -- instead of calling Ms. Ryan, having this one post
7 put up as evidence of her views of Black Lives Matter.

8 MR. PETERSON: Same objections as earlier, Your Honor.

9 JUDGE SOTOLONGO: All right. Duly noted.

10 It's of somewhat limited relevance but I will admit it
11 and give it its proper weight.

12 I'm noting, with that respect, that, you know, this
13 may reflect just the one employee -- Ms. Ryan's views, and
14 not necessarily the views of the group.

15 And I guess, the rest of the evidence will either
16 support or contradict her views as to what the group's aims
17 and motives were.

18 MR. BROWN: Agreed. She's yet one more employee
19 defining what Black Lives Matter means.

20 MR. PETERSON: And it's a snapshot in time of what she
21 expressed of her opinion, and there may be more to it.

22 JUDGE SOTOLONGO: Duly noted.

23 You know -- essentially, just so you know, the Board
24 has often advised us that in case -- or, unless the
25 evidence is absolutely and clearly relevant, that -- that -

1 - offers absolutely no probative value whatsoever, more or
2 less, is one of a hearsay nature or some other -- or
3 violates some other rules of evidence that makes its
4 admission basically -- would make its admission an error,
5 the Board has advised us, in cases where evidence may fall
6 in a gray area to err in the side of admitting it, and then
7 give it whatever weight -- so that -- you know, the judge
8 deems it appropriate. That way the Board can then look at
9 it and say, well, we agree with the judge, this doesn't
10 have much probative value or, to the contrary, we think
11 that this reflects something of importance, as opposed to
12 excluding it and then finding -- having the Board find that
13 I made -- the judge made an error, an error which would
14 result in the remand of the case to consider additional
15 evidence.

16 So, obviously, I don't think this would be the type of
17 evidence that would cause a remand. But rather than risk
18 that scenario, the Board has often advised us that in cases
19 where it's a gray area, just admit it and deal with it by
20 giving it or not giving it any weight. And at least the
21 Board has it before it, and they can then take a look at it
22 and decide themselves whether the evidence has any
23 probative value.

24 Anyway -- so --

25 MR. BROWN: We could call Ms. Ryan and she could say

1 exactly this. So --

2 MR. PETERSON: Right.

3 JUDGE SOTOLONGO: Very well. So 34 is admitted.

4 (Respondent's Exhibit 34 admitted into evidence.)

5 MR. BROWN: Two other documents, Your Honor. I'd like

6 to show you what's been marked for identification as

7 Respondent's 35, which is a two-page document.

8 (Respondent's Exhibit 35 marked for identification.)

9 MR. BROWN: We have reached a stipulation with counsel

10 for the General Counsel as to their authenticity. This

11 relates to a subpoenaed witness -- Peterlee Dorielan, who

12 is a team member -- and these are public Facebook posts

13 from the relevant time period in 2020, where Mr. Dorlien --

14 Dorielan -- I apologize -- is expressing exactly how he

15 defines Black Lives Matter. And he is a team member. And

16 you're right, Your Honor, he is one of many.

17 And we would move for Respondent's 35 --

18 JUDGE SOTOLONGO: When you say he was a subpoenaed --

19 MR. BROWN: We subpoenaed him to testify today. And

20 in lieu of his testimony, which would be to authenticate

21 these two documents, we are submitting and requesting that

22 they be admitted in lieu of his testimony authenticating

23 the documents.

24 JUDGE SOTOLONGO: Okay. But he's not one of the

25 Charging Parties, is he?

1 MR. BROWN: He is not.

2 JUDGE SOTOLONGO: All right. Was he one of the
3 employees who's --

4 MR. BROWN: He certainly was a participate in
5 protests. And other witnesses have testified about him.
6 In this hearing.

7 MR. PETERSON: Same objections, Your Honor.

8 JUDGE SOTOLONGO: All right. And for those same
9 reasons just expressed, I'm going to admit it and give it
10 whichever weight I think appropriate.

11 (Respondent's Exhibit 35 admitted into evidence.)

12 MR. BROWN: Last document, Your Honor, that we've
13 reached a stipulation with counsel for the General Counsel
14 is a -- we're going to mark for identification as
15 Respondent's Exhibit 36.

16 (Respondent's Exhibit 36 marked for identification.)

17 MR. BROWN: And then move on to a live witness, Your
18 Honor.

19 MS. SCHAEFER: It's Your Honor's.

20 MR. BROWN: It is a public Facebook post of Cedrick
21 Juarez, who is a team member at River Street. His name
22 came up in Ms. Kinzer's testimony. And he was subpoenaed,
23 Your Honor, to testify to authenticate this document but
24 because of the stipulation we don't believe we need to have
25 him come and testify as to it.

1 And as counsel for the General Counsel has stated
2 repeatedly about the rule of completeness, this is the full
3 posts. And we think that its relevance as to the exchanges
4 between him and -- him directly, and others, about Black
5 Lives Matter protest, is relevant. And we ask that you
6 give it whatever weight you deem appropriate. And that's
7 why we're asking that Respondent's Exhibit 36 be moved into
8 evidence.

9 MR. PETERSON: Same objections. And particularly the
10 public -- or, what appear to be public posts -- these
11 individuals aren't identified. Again, the probative value
12 that it adds doesn't seem to exist.

13 JUDGE SOTOLONGO: All right. For the same reasons,
14 I'm admitting it. And, again, I will give it the weight
15 that I deem appropriate.

16 (Respondent's Exhibit 36 admitted into evidence.)

17 MR. BROWN: Thank you, Your Honor. And --

18 JUDGE SOTOLONGO: And keeping in mind that, you know,
19 the postings by the members of the general public -- or,
20 whoever may have contributed to that blog or the posts,
21 obviously are of less relevance than the comments of
22 perhaps the employees who may have been participants in
23 this protest.

24 MR. BROWN: Yes, of course.

25 JUDGE SOTOLONGO: All right. So -- all right.

1 MR. BROWN: Your Honor, we will confer about a date
2 for the two witnesses next week. It will be Tuesday or
3 Wednesday but we'll talk about that. And that's --

4 MR. PETERSON: Agreed.

5 MR. BROWN: Okay. I'm going to get our next witness.

6 JUDGE SOTOLONGO: Please do.

7 Let's go off the record while you get the witness.

8 [OFF THE RECORD]

9 [ON THE RECORD]

10 JUDGE SOTOLONGO: Mr. Ferrell, welcome back.

11 MR. FERRELL: Good morning, Your Honor.

12 JUDGE SOTOLONGO: All right. Let's go back on the
13 record.

14 All right. Would Respondent please call its first
15 witness.

16 MR. BROWN: Respondent calls Mr. Scott Duncan, Your
17 Honor.

18 JUDGE SOTOLONGO: Scott Duncan, okay.

19 Mr. Duncan, let me swear you in. Please raise your
20 right hand there.

21 SCOTT DUNCAN

22 being first duly sworn on oath was questioned and stated as
23 follows:

24 JUDGE SOTOLONGO: Thank you. Could you please spell
25 your name for us and give us -- I guess your business

1 address will suffice.

2 THE WITNESS: All right. Scott Duncan. S-c-o-t-t.

3 And it's D-u-n-c-a-n. And my business address is 40

4 Railroad Ave. in Andover, Mass.

5 JUDGE SOTOLONGO: Okay. That's a Whole Foods store,
6 correct?

7 THE WITNESS: Yes, sir.

8 JUDGE SOTOLONGO: Okay.

9 All right. Mr. Ferrell, please proceed.

10 MR. FERRELL: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. FERRELL:

13 Q Mr. Duncan, good morning. Do you mind if I call
14 you Scott today?

15 A Yes, that's fine, sir.

16 Q Scott, are you currently employed?

17 A Yes, I am.

18 Q For whom do you work currently?

19 A Whole Foods Market.

20 Q When did you begin working at Whole Foods Market?

21 A August 2003.

22 Q What is your current position with Whole Foods?

23 A I'm currently the associate store team leader in
24 our Andover, Mass. store.

25 JUDGE SOTOLONGO: Excuse me, what was that? The

1 associate --

2 THE WITNESS: Associate store team leader.

3 BY MR. FERRELL:

4 Q You say that's in the Andover, Massachusetts
5 store?

6 A Yes, sir.

7 Q How long have you worked in the Andover, Mass.
8 store?

9 A I want to say it's approach -- it's approaching a
10 year.

11 Q And have you been the associate store team leader
12 there the entire time that you've been there at that store?

13 A Yes, sir.

14 Q What position did you hold immediately before
15 going to the Andover store?

16 A I was the store team leader at our River Street
17 store in Cambridge.

18 Q How long were you the store team leader at River
19 Street?

20 A I want to say, over a year, year and a half.

21 Q Do you recall when you started at the River
22 Street store?

23 A I don't recall the exact date, sir.

24 Q Does beginning of 2020 sound about right?

25 A It was towards the beginning.

1 Q And when you joined the River Street store around
2 the beginning of 2020, was that as the store team leader?

3 A Yes, sir.

4 Q What was the reason you moved from the River
5 Street to the Andover store?

6 A I decided to take a step back and focus on my
7 personal life. My ex-wife had passed away, and I have two
8 younger children. It just -- I didn't feel like I could
9 keep up with the responsibilities of being a store team
10 leader with all the distractions at home.

11 Q Before River Street, did you hold any other store
12 or facility-wide leadership positions with Whole Foods?

13 A Yes, sir.

14 Q Where was that?

15 A Prior to River Street, I was a store team leader
16 in our Jamaica Plain store. In Boston.

17 Q About how long were you the store team leader at
18 the Jamaica Plain store in Boston?

19 A About a year and a half.

20 Q What about before Jamaica Plain, did you have any
21 store leadership positions?

22 A Yes, sir.

23 Q Where was that?

24 A Before Jamaica Plain I was the associate store
25 team leader in our Lynnfield location.

1 Q For about how long?

2 A In Lynnfield, I believe it was about two years.

3 Q Before Lynnfield, did you also have a facility --

4 A Yes.

5 Q -- leadership role?

6 A Yes, sir. I was the associate facility team
7 leader at our North Atlantic Kitchens which were located in
8 Chelsea, Mass.

9 JUDGE SOTOLONGO: And just for my clarification, or
10 edification, associate team leaders typically are like the
11 assistant store manager? That would be the --

12 THE WITNESS: Yes, sir.

13 JUDGE SOTOLONGO: Whereas the team leader would be the
14 store manager, would that be correct?

15 THE WITNESS: Yes, sir.

16 JUDGE SOTOLONGO: Okay. All right.

17 BY MR. FERRELL:

18 Q Now, I won't -- you've been there since 2003,
19 Scott, so we won't go through all your jobs. I think it
20 would test your memory if we tried. But when you started
21 in 2003, what position were you hired into at Whole Foods?

22 A I was hired as a team member, just an entry-level
23 team member at our Bread and Circus bakehouse in Medford,
24 Mass.

25 Q And you've worked your way up from there.

1 A Yes.

2 Q Scott, focusing on your experience at the River
3 Street store in Cambridge. Can you describe what your
4 responsibilities were as the store team leader at River
5 Street?

6 A Oversee the day-to-day operations of the store,
7 overall safety for team members, facility safety,
8 mentoring, coaching team members. Obviously, financials of
9 the store, making sure quality's where it should be, and
10 basically making sure everyone has the tools, time and
11 support to do their job.

12 Q About how many people worked at the River Street
13 at the time you were the store team leader there?

14 A If I recall correctly, it was over 160.

15 Q And on average, what would be typical for how
16 many people would be working in the store at any given one
17 time? Is there a range?

18 A I'd say, between 40 and 60.

19 Q Looking at the management structure of the River
20 Street store and how it was organized, who reported to you
21 directly when you were store team leader at River Street?

22 A I had an associate store team leader, Daniel
23 Langley.

24 Q Did you say Danny Langley?

25 A Yes.

1 Q And just to make sure -- Plexiglas makes it extra
2 complicated, so you got to project your voice a little bit.
3 I appreciate it.

4 A Okay.

5 Q Danny Langley.

6 How many associate store team leaders were at the
7 River Street store when you got there?

8 A When I got there? Just Danny.

9 Q Was there a time when there became more than one?

10 A Yes, sir.

11 Q Do you recall about when that was?

12 A I don't recall the exact date.

13 Q Some time in summer 2020 -- would that sound
14 about right?

15 A Yes, sounds about right, sir.

16 Q And what was the occasion that you had an
17 additional associate store team lead?

18 A That store was always set up to have two. We
19 were just short in the region. And so Jennifer ended up
20 being placed at the store.

21 Q Do you remember Jennifer's last name?

22 A Starts with -- no, I don't. It starts with a D.
23 It's difficult for me to pronounce.

24 Q The best my Tennessee accent will do is
25 Desrossiers (phonetic)? Does that sound about right?

1 A Yeah.

2 Q Jennifer Desrossiers?

3 What are the responsibilities -- can you describe for
4 the judge the responsibilities of the associate store lead?

5 A The associate store team leader would be
6 essentially the store team leader when I was not in the
7 building. They don't have the final say in everything but
8 in my absence they would be the store team leader. They
9 would be responsible for the day-to-day operations when
10 they were in the building.

11 Q Now, as the store team leader, would you work the
12 same or different times than the associate store team lead
13 -- Danny Langley, for example, when you got there?

14 A It depends. There are many times where we would
15 overlap or work the same shifts.

16 Q Beneath the associate store team lead, what's the
17 next level of store management or leadership at the River
18 Street store?

19 A Team leader.

20 Q Team leader.

21 And what's a team leader do?

22 A That's a department head. They oversee each
23 individual department.

24 Q And at the River Street store, do you recall what
25 the different departments were?

1 A Yes.

2 Q Can you tell us what they are?

3 A Yes. That would be customer service, produce,
4 the meat department, seafood, bakery, specialty, prepared
5 foods -- I feel like I'm missing one. There's nine total.

6 Q Is there a department called whole body?

7 A Yes, whole body. I'm sorry. And grocery.

8 Q And grocery.

9 So that's the nine?

10 A Yes, sir.

11 Q Nine departments.

12 So you have nine team leaders that each individually
13 run their department?

14 A Yes, sir.

15 Q What role would the team leaders play in terms of
16 administering or enforcing policies, work rules in the
17 store?

18 A They are in charge of making sure that everyone
19 on their team is following policy. And if not, to report
20 it to either myself or Danny. They're also responsible for
21 tracking attendance points, things of that matter.

22 Q Do team leaders on occasion write or administer
23 written discipline?

24 A Yes, sir.

25 Q Are you necessarily involved, you know, every

1 time that they administer discipline?

2 A No.

3 Q Is an associate store team leader necessarily
4 involved any time a team leader writes or administers
5 discipline?

6 JUDGE SOTOLONGO: So, in other words, these team
7 leaders can independently assess and decide whether a team
8 member deserves to be disciplined?

9 THE WITNESS: They have discretion to. They would
10 check in with myself or Danny. We don't have to
11 necessarily write it, we don't necessarily have to be there
12 when it's issued.

13 JUDGE SOTOLONGO: Okay. But they have to check with
14 you first, before they issue the discipline?

15 THE WITNESS: Yes.

16 BY MR. FERRELL:

17 Q Will the team leaders --

18 Terminology-wise, Whole Foods' performance reviews are
19 called dialogues? Right?

20 A Job dialogue, sir, yes.

21 Q Performance dialogues?

22 A Job dialogue, sir.

23 Q Job dialogues?

24 A Yes, sir.

25 Q Who prepares those generally for a team member?

1 A Those are team leaders.

2 Q What's your -- as the store team lead, what's
3 your involvement in those job dialogues?

4 A In writing job dialogues, I don't -- the only job
5 dialogues that I would write for as team leaders, team
6 leaders would come and get approval for a wage increase, if
7 they wanted to offer a wage increase to a team member who
8 they felt deserved it.

9 Q But if their job dialogue, their review didn't
10 involve a change in pay, would you be involved at all --

11 A No.

12 Q -- in the performance review?

13 A No, sir.

14 Q Now, do the team leaders themselves have support
15 in running and leading their teams?

16 A Yes, sir, they do.

17 Q What are those positions called?

18 A Those are associate team leaders.

19 Q Does every department -- every team leader have
20 an associate team leader?

21 A Yes, sir.

22 Q Do any departments have more than one associate
23 team leader?

24 A Yes. Depending on the sales volume of the store
25 and the size of the department, there are teams that have

1 multiple.

2 Q At River Street, did any department have two
3 associate team leaders?

4 A Yes, sir.

5 Q What departments would those be?

6 A Customer service.

7 Q Just customer service?

8 A Yes, sir.

9 Q Now, customer service, that was the largest
10 department at the River Street store?

11 A Yes, sir.

12 Q Was it organized into sub-teams?

13 A Yes, sir.

14 Q Do you remember what they were?

15 A It would be clean team --

16 Q I'm sorry, you said "clean"?

17 A Clean team. Maintenance.

18 Q Okay.

19 A Prime shoppers.

20 Q That would be the Amazon Prime shoppers?

21 A Yes, sir.

22 Q Is that where Charging Party Savannah Kinzer
23 worked?

24 A Yes, sir.

25 Q I'm sorry. Are there any others?

1 A Yes. They also oversaw what was called SSI. And
2 that is the department that prints tags and makes sure the
3 correct signage is up in the store. They all role into
4 store support -- customer service.

5 Q Okay. Any other sub-teams in customer service?

6 A Cashiers. That's the biggest department.

7 Q That's the biggest group within customer service?

8 A Yes, sir.

9 Q Is that where Mr. Suverino Frith worked?

10 A Yes, sir.

11 Q Do you recall, when you were there in 2020, who
12 the team leader was for customer service department?

13 A Yes. Merisa.

14 Q Would that be Merisa Abotchie?

15 A Yes, sir.

16 Q Now, you mentioned customer service had two
17 associate store team leads. Team leaders.

18 A Yes, sir.

19 Q In 2020 do you remember who they were?

20 A It was Luc and Shae.

21 Q Shae -- would that be Shae Morgan?

22 A Yes, sir.

23 Q Just ask you to speak up a little bit.

24 So Shae Morgan?

25 A Yes, sir.

1 Q And Luc -- you remember his name -- is it Luc
2 DeMarias? Does that sound right?

3 A Yes, sir.

4 Q So Shae and Luc had held the same job within
5 customer service as ATLs -- is that how they're referred
6 to?

7 A Yes, sir.

8 Q Is there any reason Ms. Kinzer might have worked
9 more with Shae Morgan than with Luc?

10 A Yes, on a team that size, the team leader most
11 often times would delegate sub-teams to one or the other if
12 they had two ATLs.

13 Q And do you recall if Shae was delegated to --

14 A Yes.

15 Q -- as prime responsibility for the Prime
16 shoppers?

17 A Yes, she was.

18 Q Now, if Shae wasn't there, does Luc have the same
19 job?

20 A Yes, sir.

21 Q What role, if any, did ATLs play at River Street
22 in tracking attendance?

23 A ATLs were tracking attendance as well as team
24 leaders.

25 Q Are you familiar with an attendance tracker?

1 A Yes, sir.

2 Q What is an attendance tracker?

3 A It's the form used to track attendance points for
4 team members.

5 Q You say a form. Is it an electronic form?

6 A It was kept electronically.

7 Q Is it kept in a spreadsheet?

8 A Yes.

9 Q And how would it -- who would make entries on the
10 attendance tracker?

11 A The team leader or the ATL.

12 Q The ATL being the associate team leader?

13 A Yes, sir.

14 Q So is this one central spreadsheet for everybody
15 in the store?

16 A No, each department has their own.

17 Q And it's got all the team members from that
18 department in that spreadsheet?

19 A Yes.

20 Q Keeping track of when they're late or leave
21 early, is that right?

22 A Yes, sir.

23 Q And this is something you would administer or
24 monitor on a daily basis or no?

25 A I would not.

1 Q When a team member reports to work for their
2 shift, who do they typically check in with to show they're
3 there?

4 A Team leader or ATL.

5 Q Team leader or ATL?

6 A Yes, sir.

7 Q What about for yourself as a store team leader or
8 an associate store team leader, is a team member going to
9 check in with you? Or how long might it be before you see
10 them on their shift?

11 A On a typical day when I come into the store, what
12 depend -- you know, regardless of what shift it is, I'll
13 walk every department and I'll say hi to as many people as
14 I can before I go settle in and see what's going on for the
15 day.

16 Aside from that, if you came in after me or what
17 have you, and you're a cashier, it could literally be hours
18 or, in certain situations, entire shift that I don't see a
19 team member.

20 Q And do the team leaders -- do you have an office
21 somewhere in the store?

22 A Yes, sir.

23 Q Is that in the back, off the sales floor?

24 A It's off the sales floor, sir, yes.

25 Q So when you said a moment ago, you know, "I

1 settle in and see what needs to be done for the day," are
2 you going to your office? Is that where that's taking
3 place?

4 A Yes, sir.

5 Q Now, underneath the associate team leaders that
6 we talked about, in an effort to make it even more
7 confusing, is there a job classification called supervisor?

8 A Yes, sir.

9 Q And that's an hourly, non-leadership job, is that
10 right?

11 A That is correct.

12 Q And what is the job of a supervisor?

13 A Supervisor is to lead the team, make sure that
14 people are following safety codes, if a customer has an
15 issue, you know, a team member needs help with something --
16 kind of directing -- delegating how team members are
17 working on the floor.

18 Q How many people in a supervisor classification
19 does each department have?

20 A Depends on the size of the team, sir.

21 Q So it might range from what to what?

22 A A team as large as customer service would have as
23 many as five or six supervisors. A small team like seafood
24 wouldn't have a supervisor. There's only five people on
25 the team.

1 Q Now, one of the other Charging Parties in this
2 case -- Kirby Burt -- I believe her job classification was
3 a buyer. Do you recall that?

4 A Yes, sir.

5 Q How does the job of a buyer fit into the store
6 structure at River Street?

7 A It is the same level as far as pay grade and the
8 pay scale as a supervisor. In lieu of a supervisor not
9 being there, ATL not being there, team leader not being
10 there, the go-to person on the team would be the buyer.

11 Q But aside from that, if the ATL or the
12 supervisor's there, the job of the buyer is what?

13 A Is to make purchases.

14 Q And in the case of Ms. Burt, do you recall what
15 her specific job was?

16 A Yes, sir. She was the wine buyer.

17 Q And do we have another position in the store
18 called a shift leader position?

19 A Yes, sir.

20 Q What is that position?

21 A Shift leader is someone who is in charge of the
22 store when store team leader's not there, associate store
23 team leader's not there. This person is specifically there
24 in case something breaks and you have to make a call, if a
25 fire breaks out in the store, someone to take direction.

1 It's not a position where they have any -- they don't get
2 involved in counseling, they don't get involved in any kind
3 of discipline or anything like that. They don't make
4 hiring decisions. They're specifically there to support
5 team members and customers in lieu of store leadership not
6 being there.

7 Q On the sales floor?

8 A On the sales floor, yes, sir.

9 JUDGE SOTOLONGO: They're somebody to put out the
10 fires? Is that --

11 THE WITNESS: Yes, sir.

12 JUDGE SOTOLONGO: Okay.

13 BY MR. FERRELL:

14 Q We talked about this a little bit before -- you
15 started out this way, but the entry-level job in any
16 department at a Whole Foods store is called what?

17 A Team member.

18 Q And just to go back for one second. We talked
19 about Kirby Burt was a wine buyer. What department did
20 that fall in?

21 A Specialty.

22 Q Scott, I want to ask you some about the authority
23 and the organization that's above you, that's outside the
24 store. Okay?

25 A Okay.

1 Q As the store team leader for River Street, who do
2 you directly report to, or who did you directly report to?

3 A Eliza Brown.

4 Q Do you remember Eliza Brown's job title?

5 A Executive leader of operations.

6 Q And do you recall if she has responsibility for
7 more than just the River Street store?

8 A Yes, sir. She was responsible for multiple
9 locations.

10 Q Are those multiple locations within what's
11 referred to as the North Atlantic Region?

12 A Yes, sir.

13 Q Do you know the reporting structure within -- and
14 operations for the region above Eliza Brown -- who that was
15 at the time?

16 A Yes, sir.

17 Q Who was above Eliza in operations?

18 A Ben Rose.

19 Q Do you remember Ben's title?

20 A Yes, sir. He was the vice president of the North
21 Atlantic Region.

22 Q And above Ben, do you remember who he reported
23 to?

24 A Yes, sir. That would be Rick Bonin, who was the
25 regional president of the North Atlantic Region.

1 Q Now, Scott, who performed what I'm going to call
2 the traditional human resource functions for the River
3 Street store -- who's that done by at Whole Foods?

4 A Team Member Services. That would be Brian.

5 Q The group is called Team Member Services?

6 A Yes.

7 Q You mentioned Brian. Do you remember Brian's
8 last name?

9 A I do not, sir.

10 Q if I said Brian Smith, does that sound about
11 right?

12 A Yes, it does.

13 Q And do you remember what his title was?

14 A He was a team member service generalist.

15 Q And was he your first point of contact for team
16 member support -- Team Member Services for the River Street
17 store?

18 A Yes.

19 Q And like Ms. Brown, do you recall if he had
20 responsibility for multiple stores?

21 A Yes, he did. He oversaw three stores, I believe.

22 Q Who above Brian, if anyone, in Team Member
23 Services did you communicate with, deal with?

24 A Jamie Zito.

25 Q Do you remember what Jamie Zito's title was?

1 A Executive leader.

2 Q So was he executive leader for TMS -- or,
3 executive leader in TMS for the region -- the North
4 Atlantic Region?

5 A Yes, sir. That is correct.

6 Q Were Brian and Jamie the two you would most often
7 speak to at TMS?

8 A Yes, sir.

9 Q What types of things would you call them about or
10 reach out to them about?

11 A If a team member wanted to take a leave of
12 absence, if there was any question on any kind of
13 counseling that was going on --

14 Q When you say "counseling," do you mean like
15 corrective counseling?

16 A Yep. Yes, sir.

17 Q So discipline issue.

18 A Discipline issues. Yes, sir.

19 Q What else -- what other types of issues would you
20 reach out to TMS about?

21 A If I wasn't clear on a policy, I would reach out
22 to TMS. And most importantly, if someone was about to be -
23 - if someone was at a point in their career where they were
24 going to be separated from Whole Foods Market, I would
25 reach out to Brian for approval on that.

1 Q And when you say "reach out to TMS" -- when you
2 would contact TMS in a situation like that, what are you
3 asking them to do? In a separation. Termination.

4 A Separation -- I would explain where we were at in
5 the process, what the situation was, you know, where I
6 stood on it -- you know, I support separation, I -- how --
7 you know, is this something we want to move forward with.

8 Q And in contacting them, are you looking for
9 alignment, for lack of a better term, with TMS? That
10 they're on the same page you are with that decision?

11 A Yes.

12 Q Scott, did Whole Foods have a dress code policy
13 when you were the store team leader in River Street?

14 A Yes.

15 MR. FERRELL: Counsel, do we have witness copies of
16 the General Counsel exhibits up there? If I go to the pile
17 -- I'm looking at General Counsel's 2. Is there --

18 Oh, I'm sorry, it might be GC 3. I'm sorry.

19 MR. PETERSON: I didn't bring a lot of copies of --

20 JUDGE SOTOLONGO: I have GC 3 here, if --

21 MR. FERRELL: The policy?

22 MS. SCHAEFER: Oh, the GIG?

23 MR. FERRELL: The GIG, yeah.

24 Bear with me one second, Your Honor. I just want to
25 make sure the witness has a copy.

1 MS. SCHAEFER: So this is just a part of the --

2 MR. FERRELL: Part of the exhibit, and it's part of
3 the case.

4 MS. SCHAEFER: It's part of the case -- the attorney
5 --

6 MR. PETERSON: Here's a big one of General Counsel's
7 3.

8 MR. FERRELL: Oh. If I could use that with the
9 witness, if that's all right with you.

10 MR. PETERSON: Yes.

11 MR. FERRELL: Permission to approach, Your Honor?

12 JUDGE SOTOLONGO: Please.

13 BY MR. FERRELL:

14 Q Scott, I've handed you what's in evidence as
15 General Counsel's 3. And let's see if we can find the same
16 page together. If you turn to page -- what I believe is
17 marked at the bottom right-hand corner "General Counsel
18 Exhibit 3, page 69 of 158."

19 A Yes, sir.

20 JUDGE SOTOLONGO: Fifty-nine or 69?

21 MR. FERRELL: Sixty-nine of 158.

22 BY MR. FERRELL:

23 Q And, Scott, just to confirm, there should be a
24 stamp in the lower right-hand corner that says "WFM page
25 105"?

1 A Yes, sir.

2 Q Okay. So do you recognize this document?

3 A Yes, sir.

4 Q You mentioned the North Atlantic Region before.

5 That's the region the River Street store is located in,
6 right?

7 A Yes, sir.

8 Q Are you familiar with people referring to a
9 document as "the GIG"?

10 A Yes, sir.

11 Q Does the GIG stand for general information guide?

12 A Yes, it does.

13 Q And for the North Atlantic Region, is this the
14 GIG?

15 A Yes, sir.

16 Q As of May 2020?

17 A Yes, sir.

18 Q If you'll turn the page, to page 70 of 158 --

19 A Yes.

20 Q And under "life at work," it says "dress code,"
21 right?

22 A Yes, it does, sir.

23 Q And starting there on that page, is that the
24 dress code as it was in effect then for the North Atlantic
25 Region?

1 A Yes, sir.

2 Q That's what covered the River Street store?

3 A Yes, sir.

4 Q Scott, describe for the judge how enforcement of
5 the dress code would happen at the River Street store. Who
6 was responsible for that and how it would take place.

7 A Everyone in leadership takes a responsibility in
8 making sure dress code is in compliance. That would be
9 ATL, TL, ASTL, and STL.

10 Q Now, who has greater contact with the team
11 members in terms of interacting with them directly to
12 enforce or to notice dress code violations?

13 A Yes, sir, that would be the actual department
14 heads. When team members clock in, they don't check in
15 with myself, they don't check in with Danny, they go right
16 to their department. So the department leads -- whether
17 that be the ATL or the TL -- whoever's at the moment --
18 would be the first person to see the team member and have
19 the most interaction with that team member throughout their
20 shift.

21 Q So what are the circumstances where you, as a
22 store team leader would get involved in -- in ordinary
23 times anyway, with enforcement of dress code violation?

24 A If I happen to be on the sales floor and notice
25 something that really popped out at me, I would address it

1 in the moment. Other than that, it would be one of the
2 team leads coming up and saying "I think so-and-so is out
3 of dress code," and then we would address it that way.

4 Q Scott, what was the process for addressing it
5 with a team member who's out of dress code?

6 A They were always offered the opportunity to --
7 well, first you make them aware that they're out of dress
8 code, because nine times out of ten, I would find that
9 people just weren't that familiar with the policy. And if
10 it was -- you know, whether -- if it was a shirt that was
11 out of dress code, we have tons of T-shirts at the store
12 that are in compliance with our dress code. It just has a
13 Whole Foods logo on it.

14 If it was an issue with pants, which is a little bit
15 tougher to deal with, we do have chefs pants that, you
16 know, typically you would wear in the kitchen but it's
17 Whole Foods-issued, if they changed.

18 Q Did Whole Foods also -- in 2020, during the
19 pandemic, did you maintain a supply of masks as well? Face
20 mask.

21 A Yes, sir.

22 Q What about shoes? Was that the most difficult to
23 --

24 A Shoes are the hardest ones, because we just -- we
25 don't have extra shoes laying around. People aren't going

1 to share shoes with each other, so -- they don't -- you
2 know, it's impossible to have every size shoe. So shoes
3 would be the more difficult -- shoes would be one reason
4 why someone was unable to get into dress code and would
5 choose to leave and get in dress code and come back or what
6 have you.

7 Q Now, if somebody's identified as being out of
8 dress code, you say we have T-shirts, we have chef pants.
9 So what was the most common outcome of somebody who it's
10 brought to their attention they're out of dress code?

11 A They would get into dress code. They would
12 continue working.

13 Q You say they continue -- once they're in dress
14 code, they would continue working?

15 A Yes, sir.

16 Q And would an individual ordinarily incur any type
17 of discipline for having been out of dress code, now
18 they've changed and are going to work in dress code?

19 A No, sir.

20 Q Now, if a team member was out of dress code and
21 either not willing to get into dress code or it's a shoe
22 issue and you can't fix it with something you have at the
23 store, and they don't come back, how would that be
24 addressed -- under the dress code and policy, what would
25 happen?

1 A So if the team member went home early, it would
2 fall under the time and attendance policy, and they would
3 get one point for leaving early.

4 Q And that one point is under the attendance
5 policy?

6 A Yes, sir.

7 JUDGE SOTOLONGO: So, in other words, if -- because of
8 shoes or some other item of clothing that you could not
9 substitute for in the store and you had to send a team
10 member home to change, they would get an attendance point?

11 THE WITNESS: If they came back to work, and it was
12 the first instance of them being out of dress code -- they
13 weren't aware, and they went home and changed and came
14 back, they would not get the point.

15 JUDGE SOTOLONGO: Okay. But any time after that --
16 any repeat --

17 THE WITNESS: Yes, if they went home early and didn't
18 come back, they would receive a point, sir --

19 JUDGE SOTOLONGO: I see. Okay.

20 THE WITNESS: -- yes, sir.

21 JUDGE SOTOLONGO: Understood. Okay.

22 BY MR. FERRELL:

23 Q And, Scott, how did the attendance points work?
24 What does that mean that somebody gets an attendance point?
25 What's the ramification of that?

1 A It's a way for us to track people's attendance,
2 hold people accountable as necessary. The policy is set up
3 in a way that it's pretty lenient compared to other
4 companies I worked for. So you have to get -- before you
5 get any kind of counseling statement, you have to have five
6 points in a 30-day period.

7 Points are set up -- if you're late, you get one
8 point. If you go home early, you get one point. If you
9 have a missed punch, it's a quarter point. And if you --

10 Q A missed punch being on a timeclock?

11 A Yes, sir.

12 If you are absent, you get two points.

13 Q Scott, in General Counsel's 3 that's in front of
14 you, can you turn to page 94 of 158?

15 It will have a Bates stamp in the lower right-hand
16 corner of WFM 130. Tell me when you have it.

17 A I'm sorry, what'd you say, 94?

18 Q Ninety-four of 158.

19 A Yes, sir. I have it.

20 Q And this is under a heading "accumulating
21 points." Do you see that?

22 A Yes, sir.

23 Q And there's a chart there.

24 A Yes.

25 Q And does this chart describe what you were just

1 testifying about?

2 A Yes, sir.

3 Q Where it says absence is two points?

4 A Yes, absence is two points. A tardy is one
5 point. A missed mealtime is a half point. A missed punch
6 is a quarter point.

7 Q And looking at the tardy, it says "tardy," and it
8 has a paren, "more than ten minutes." What's the ten
9 minutes?

10 A So that's the grace period team members have. By
11 the time they punch in --

12 Q So somebody who punches in six minutes after the
13 start of the shift, they incur how many points?

14 A Zero.

15 Q But somebody who's 11 minutes, 12 minutes?

16 A One point, sir.

17 Q If you turn to the next page -- 95 of 158.

18 A Yes, sir.

19 Q You see this chart under "counseling
20 expectations"?

21 A Yes.

22 Q You testified a moment ago about five points in
23 30 days to get a first counseling. Is this chart
24 summarizing what you were just talking about?

25 A Yes, sir.

1 Q So can you explain, describe for us how the
2 counseling steps work, just under the attendance plan as
3 set forth in this chart?

4 A Yes, sir. So it's five points in any rolling 30
5 days. So it doesn't reset by the calendar, it resets by
6 the 30-day mark. After those five points, you'll be issued
7 what we call a verbal warning, which is a first counseling.
8 If you get four more points in the next 60 days, that
9 escalates that verbal to a written warning, which is the
10 next step in the corrective action process.

11 If you get four points in any rolling 90 days
12 from your written warning, then you'll be placed on a final
13 warning. And then if you get four more points in 90 days
14 from the final warning, that would lead to the next step,
15 which would be separation of employment.

16 Q So if I add the five points for a verbal in 30
17 days plus four in the next 60 days plus four points in 90
18 days after the written, and another four points for
19 discharge, how many -- I'm a public school kid -- how many
20 points do I actually have to get before I get discharged on
21 just attendance?

22 Another public school kid, I like it.

23 A Seventeen points.

24 Q Seventeen points.

25 A Yes, sir. You would need 17 points to be

1 separated.

2 Q Under strictly attendance.

3 A Yes, sir, strictly under attendance.

4 Q Is this the disciplinary process you followed at
5 River Street for attendance?

6 A Yes, sir, it was.

7 Q Now, in 2020 we went into this whole of the COVID
8 pandemic that we're still in, right?

9 A Yes, sir.

10 Q Was there a time in 2020 when the time and
11 attendance policy was relaxed or suspended?

12 A Yes, sir, there was.

13 Q I'm going to show you -- let's see what's marked
14 the first one.

15 MR. FERRELL: We're on 44? Bear with me, Your Honor.

16 JUDGE SOTOLONGO: Yeah, 44 would be the next one.

17 MR. FERRELL: Permission to approach, Your Honor?

18 JUDGE SOTOLONGO: Sure.

19 MR. FERRELL: Counsel.

20 BY MR. FERRELL:

21 Q Scott, I've handed you what we've marked for
22 identification as Respondent's Exhibit 44.

23 (Respondent's Exhibit 44 marked for identification.)

24 BY MR. FERRELL:

25 Q Do you recognize this?

1 A Yes.

2 Q And just take a moment -- I know it's multi-page
3 communication. We're going to talk about them all. Do you
4 recognize this series of emails?

5 A Yes, sir.

6 Q So if you look at the first page, which, in the
7 lower right-hand corner, has got a Bates stamp of WFM page
8 24.

9 A Yes, sir.

10 Q In the third paragraph, first sentence, it talks
11 about -- it makes a reference to "modifications to our time
12 and attendance policy which allows TMs to call out of work
13 due to illness without penalty during the month of March."

14 And TMs -- you understand that refers to team
15 members?

16 A Yes, sir, it does.

17 Q And the date on this communication -- up at the
18 top -- is March 12, right?

19 A Yes, it is, sir.

20 Q Now, it says it's to team member communications -
21 - "tmcom@hwholefoods.com." Do you know who all gets this?

22 A Any team member in the company who has access to
23 email. Or who has a Whole Foods email account.

24 Q And at this time, in March of 2020, the
25 modifications to time and attendance, is this what you were

1 referring to earlier that included a relaxing or suspending
2 of attendance points?

3 A Yes. Attendance points were halted, they were
4 not issued.

5 Q And that was addressing the situation with the
6 pandemic?

7 A Yes, sir. We were just happy people showed up
8 for work.

9 Q If you turn a couple of pages to -- I think it's
10 the third page -- marked WFM 26?

11 A Yes, sir.

12 Q Again, this was sent to everyone who had an
13 email, right?

14 A That is correct.

15 Q Now, in this one, in the first paragraph it talks
16 about the previously -- I'm looking at the third line,
17 first paragraph -- "the previously announced modifications
18 to our time and attendance policy" -- I'm sorry, if you'd
19 start at the line above that -- they're extending the
20 previously announced modification to our time and
21 attendance policy through April 30, 2020. Do you see that?

22 A Yes, I do, sir.

23 Q And is your recollection that that suspension of
24 time and attendance was extended by this announcement
25 through the end of April?

1 A Yes.

2 Q And during this time now then -- from March and
3 all of April -- were you assessing or tracking anyone's
4 attendance --

5 A No, sir.

6 Q -- at the store?

7 A No, sir.

8 Q Were you issuing any attendance points at the
9 store?

10 A No, sir.

11 Q Did that include not assessing points for late
12 arrivals?

13 A There was no points tracked at all.

14 Q Including for leaving early?

15 A Including for leaving early.

16 Q If you skip to page 28. It's the last page in
17 the exhibit.

18 A Yes, sir.

19 Q This is a May 13 email. Do you see that at the
20 top?

21 A Yes, I do.

22 Q It says, "Subject, update to team member
23 policies"?

24 A Yes.

25 Q If you look at the -- the first paragraph talks

1 about an extension of temporary pay increase of \$2 per
2 hour. Do you see that?

3 A Yes, sir.

4 Q Is that what is referred to sometimes as Whole
5 Foods hero pay or hazard pay?

6 A Yes, sir.

7 Q The next part of that paragraph talks about
8 extending the relaxed time and attendance policy through
9 the end of May.

10 Is that your recollection, that time and attendance
11 policy continued to be suspended through the end of May?

12 A Yes.

13 Q And if you look at the page before, on page 27.

14 This is an email communication. Do you see it's
15 dated May 22nd?

16 A Yes, I do.

17 Q Of '20.

18 And if you're looking at the second paragraph,
19 what did this announcement indicate about the extension of
20 the suspension on time and attendance policy?

21 A They were extending it until June 21, 2020.
22 Beginning June 22, 2020, we return to our standard time and
23 attendance policies.

24 Q So was this document basically providing about a
25 one month's notice?

1 A Yes, sir.

2 Q Of resuming time and attendance?

3 A Yes, it was one month, 30 days.

4 MR. FERRELL: Your Honor, move to admit Exhibit --
5 Respondent's 44 into evidence.

6 JUDGE SOTOLONGO: Any objection?

7 MR. PETERSON: Just one quick voir dire?

8 VOIR DIRE EXAMINATION

9 BY MR. PETERSON

10 Q You mentioned who this email goes out to --
11 anyone with a Whole Foods email account?

12 A Yes, sir, that's correct.

13 Q Who all had Whole Foods email accounts?

14 A That would be anybody in any kind of leadership
15 position, buyers, supervisors, team trainers -- different
16 team members may have it for -- if they were part of the
17 Green Mission, those team members were allowed access.
18 It's a lot of people.

19 Q So not all team members but some team members may
20 have?

21 A Yeah. Not every single team member has email
22 address, that is correct, sir.

23 MR. PETERSON: No objection.

24 JUDGE SOTOLONGO: All right. Respondent's 44 is
25 admitted.

1 (Respondent's Exhibit 44 admitted into evidence.)

2 JUDGE SOTOLONGO: Let me ask you, Mr. Duncan. For
3 those team members who did not have a company email -- a
4 Whole Foods email account, was this note -- were these
5 notices posted or in any way announced to team members at
6 large?

7 THE WITNESS: Yes, sir.

8 JUDGE SOTOLONGO: Where were these posted or --

9 THE WITNESS: So it would either be posted on
10 communication boards in individual departments -- and also
11 there is a media screen by the timeclock that these kind of
12 messages would be on that screen.

13 JUDGE SOTOLONGO: Please proceed.

14 MR. PETERSON: Your Honor, I didn't hear. Is it
15 admitted?

16 JUDGE SOTOLONGO: Yes, it's admitted.

17 MR. FERRELL: Scott, if you look at --
18 Do you have a General Counsel 6?

19 Never mind, never mind, I have it.

20 Permission to approach, Your Honor?

21 JUDGE SOTOLONGO: Yes.

22 BY MR. FERRELL:

23 Q Scott, you have in front of you what's been
24 admitted in evidence as General Counsel's Exhibit Number 6.

25 Taking a look at Exhibit 6 -- General Counsel's 6, do

1 you recognize this announcement?

2 A Yes.

3 Q Does it communicate the same information
4 regarding the resumption of time and attendance effective
5 June 22, 2020 as the communication we were just talking
6 about on Respondent's --

7 A Yes.

8 Q -- Exhibit 44?

9 A Yes, sir.

10 Q You can put that aside, Scott.

11 Scott, I want to ask you about the wearing of
12 Black Lives Matter face mask at the -- by team members at
13 the River Street store. Do you recall the first time you
14 learned that team members were working in Black Lives
15 Matter face mask at the River Street store?

16 A Yes, sir, I do.

17 Q How did you come to learn that?

18 A I was in my office. Luc, who is -- or, was the
19 assistant team leader for the customer service team, came
20 to the office and he asked me if team members were allowed
21 to wear Black Lives Matter on their face masks.

22 Q Do you remember what day that was?

23 A I don't recall. I don't recall the date.

24 Q Do you recall if it was around the last week of
25 June?

1 A Sounds about right, yes, sir.

2 Q What did you do in response to Luc bringing this
3 to your attention?

4 A I told him I wasn't sure.

5 Q Did you take any steps to get guidance or figure
6 it out?

7 A Yes, sir. That's what Team Member Services is
8 for. As a store team leader, if I'm not clear if something
9 is -- this is the first time that's come across my plate, I
10 would check in and see, you know, what's the correct path
11 to take. In that particular instance I called Jamie Zito.

12 JUDGE SOTOLONGO: You called who?

13 THE WITNESS: Jamie Zito.

14 BY MR. FERRELL:

15 Q Jamie Zito -- I think you testified earlier -- is
16 the executive leader for Team Member Services for the North
17 Atlantic Region?

18 A That is correct.

19 Q What guidance did you get from Jamie?

20 A Jamie told me that that was out of our dress
21 code. He instructed me to talk to each team member. It's
22 a very sensitive subject with everything going on at the
23 time. We wanted to make sure team members had time to
24 think about if they wanted to get into dress code. Each
25 team member was offered a Whole Foods mask and the

1 opportunity to get back into dress code and go to work.

2 JUDGE SOTOLONGO: You said Jane or Jamie?

3 THE WITNESS: Jamie.

4 MR. FERRELL: Jamie.

5 JUDGE SOTOLONGO: Jamie.

6 And how do you spell the last name?

7 THE WITNESS: Zito.

8 MR. FERRELL: Z-i-t-o?

9 THE WITNESS: Yeah.

10 JUDGE SOTOLONGO: Z-i-t-o. Okay. Thank you.

11 So you called the person on the phone, I would assume?

12 THE WITNESS: Yes, sir.

13 JUDGE SOTOLONGO: And you got a hold of -- is it he or
14 a she?

15 THE WITNESS: It's he.

16 JUDGE SOTOLONGO: It's he. And you got a hold of Mr.
17 Zito right away?

18 THE WITNESS: Yes, he answered right away.

19 JUDGE SOTOLONGO: And so his response was immediate
20 then?

21 THE WITNESS: No, his response was not immediate.

22 JUDGE SOTOLONGO: He had to call you back?

23 THE WITNESS: He had to call me back.

24 JUDGE SOTOLONGO: Okay. And how long did it -- how
25 much time did it pass from the time that you first posed

1 the question to Mr. Zito and the time he got back to you?

2 THE WITNESS: I would say, ten minutes.

3 JUDGE SOTOLONGO: Ten minutes?

4 THE WITNESS: It wasn't very long, sir.

5 JUDGE SOTOLONGO: Okay. He called you back ten
6 minutes later?

7 THE WITNESS: Yes, sir.

8 JUDGE SOTOLONGO: I see. Okay.

9 MR. FERRELL: Permission to approach, Your Honor?

10 JUDGE SOTOLONGO: Please.

11 MR. FERRELL: Counsel, I know you have those.

12 BY MR. FERRELL:

13 Q Scott, I've handed you what's in evidence as
14 General Counsel's Exhibit 4. It says at the top "mandatory
15 face mask SOP." Do you see that?

16 A Yes, sir.

17 Q You understand SOP to stand for standard
18 operating procedure?

19 A Yes, it does.

20 Q Do you recognize this document?

21 A Yes, I do.

22 Q What is it?

23 A It's just going over exactly what is expected as
24 far as team members are concerned and wearing face
25 coverings. Masks.

1 Q Now, was there a time in the start of the
2 pandemic, early in the pandemic, where Whole Foods required
3 that everybody in the store has got to wear a face mask?

4 A Yes, sir.

5 Q And pursuant to General Counsel's Exhibit 4, when
6 was that effective?

7 A The exact date it became effective? I don't
8 recall the exact date.

9 Q If you look at the middle of the page there.

10 A It's 4/13/20.

11 Q So April 13 of 2020?

12 A Yes, sir.

13 Q If you turn with me to page 3 of 7 of General
14 Counsel's 4.

15 And you look on the second bullet up from the bottom -
16 - second to last bullet under number 7?

17 A Yes.

18 Q Do you see that bullet -- it talks about homemade
19 or reusable cloth mask must adhere to WFM's dress code as
20 outlined in the GIG? Do you see that?

21 A Yes, sir.

22 Q And, Scott, is this what you understand Jamie was
23 talking about, that the face mask are subject to the dress
24 code policy?

25 A Yes, sir.

1 Q Now, the mandatory face mask SOP in this written
2 form, that was communicated to you as a store team leader?

3 A Yes.

4 Q How was it communicated to the team members at
5 the River Street store?

6 A As I recall, I met with all the team leaders,
7 explained everything -- you know, they had to go back --
8 because of COVID, we weren't doing full store meetings --
9 you just couldn't, so it was up to the team leaders to go
10 back, share this information with their team, post it on
11 their information boards or their logbooks, however.

12 Q So the team leaders, per your direction, would
13 communicate this to all the members on their team?

14 A Yes, sir.

15 Q You can put that aside, Scott.

16 So following Jamie Zito's direction or guidance to
17 you, did you meet with the team members who were wearing
18 the Black Lives Matter face mask the first day?

19 A Yes, sir, I did.

20 Q Did you meet with them as a group or one on one
21 or how did those meetings take place?

22 A We wanted to do them one at a time, because a
23 sensitive subject and we didn't -- you know, we didn't want
24 a group environment, especially in a small office with
25 COVID going on. There were a couple of instances -- I

1 don't recall which team members they were but there were
2 instances where team members came in together.

3 Q And did they indicate, in those instances, they
4 were more comfortable meeting together?

5 A I can't speak for them.

6 Q Okay. But you did meet with some more than just
7 one on one?

8 A Yes, sir.

9 Q And what were the size of those groups? Up to
10 three?

11 A No larger than three.

12 Q And how did those conversations -- what happened
13 in those conversations that day?

14 A I explained to them that they were out of dress
15 code, you know, we need them, want them to work, we don't
16 want them to go home. We offered them a change of mask so
17 they could be in dress code. Told them they had -- you
18 know, because of the sensitivity of it all, we didn't want
19 to just say "go home." We gave them 30 minutes to think
20 about if they wanted to get back into dress code and
21 continue working.

22 Q Did anyone agree to change their face mask, get
23 back into dress code and continue working?

24 A On that day, no.

25 Q And do you recall about how many people you met

1 with the first day?

2 A I don't recall the exact number.

3 Q Around a dozen or low double digits, would that
4 sound about right?

5 A Low double digits sounds about right. More than
6 ten.

7 Q So when they declined -- did anybody take the
8 full 30 minutes, by the way?

9 A I don't recall. I don't think anybody did, sir.

10 Q They gave you -- most of them gave you an answer
11 sooner than?

12 A Yes, sir.

13 Q So when they declined to take the face mask off
14 and get back into dress -- well, what happened to them
15 then, if they didn't want to change their mask?

16 A They were asked to punch out and go home if they
17 weren't going to be in dress code.

18 Q Did the team members say anything to you in those
19 meetings about why they wanted to wear the mask?

20 A Yes, they wanted to support the Black Lives
21 Matter movement.

22 Q And did they express or did you have any
23 understanding of what that meant?

24 A I had an understanding of --

25 MR. PETERSON: Objection. Compound.

1 JUDGE SOTOLONGO: It is.

2 Did they tell you what they meant or what was the
3 purpose?

4 THE WITNESS: Yes, sir, they did.

5 JUDGE SOTOLONGO: And what was that?

6 THE WITNESS: To support the Black Lives -- to make
7 awareness and to support the Black Lives Matter movement.

8 BY MR. FERRELL:

9 Q What did you understand them to be talking about
10 when they say they want to raise awareness and support the
11 Black Lives Matter movement?

12 A They were looking to support that movement. There
13 was, you know -- there was a lot of passion behind it at
14 the time. You know, there was a lot of mistreatment at the
15 hands of the police on, you know, Black and brown lives,
16 and they were looking to make sure people knew about that.

17 Q Did anyone in those meetings -- the team members
18 on June 24 -- express anything about wearing the mask
19 because of any complaint or issue that they had with the
20 employment practices at Whole Foods?

21 A No, sir.

22 Q Did anyone say on that day that they wanted to
23 wear the mask because of any issue having to do with Whole
24 Foods or the workplace?

25 A With any issues? No, sir.

1 Q After the -- that first day, did team members at
2 River Street store continue to either come to work in a
3 Black Lives Matter mask or put a Black Lives Matter mask on
4 during their shift?

5 A Yes, sir.

6 Q And how did you and store management -- store
7 leadership -- handle it thereafter?

8 A Yeah, it's a very sensitive subject. We would
9 call team members into the office, again explain to them,
10 you know, you're out of dress code, we'd like you to be in
11 dress code, we don't want you to have to go home, but if
12 you're not going to get in dress code, unfortunately you're
13 going to be sent home again.

14 Q Did you on occasion have some team members who
15 would choose to change their mask, get back into dress code
16 and keep working?

17 A Yes, sir.

18 Q Those team members that did that, what happened
19 to them from an attendance or disciplinary standpoint?

20 A Nothing. They went back to work.

21 Q Those that declined the invitation to get back
22 into dress code, to change their mask, and were sent home,
23 the first day and the subsequent days, what happened to
24 them from an attendance standpoint?

25 A They were issued an attendance point for leaving

1 early.

2 Q They were issued an attendance point for leaving
3 early?

4 A Yes, sir.

5 Q And this is taking place -- am I right, Scott --
6 after the reinstatement of the time and attendance policy
7 on June 22?

8 A Yes.

9 JUDGE SOTOLONGO: Can we take a five-minute break?

10 MR. FERRELL: Yes, Your Honor.

11 JUDGE SOTOLONGO: All right. Let's take a five-minute
12 break.

13 [OFF THE RECORD]

14 [ON THE RECORD]

15 JUDGE SOTOLONGO: All right. Let's go back on the
16 record.

17 Mr. Ferrell, please proceed.

18 MR. FERRELL: Thank you, Your Honor.

19 BY MR. FERRELL:

20 Q Scott, the team members wearing the Black Lives
21 Matter mask and you having these conversations -- or, you
22 or the associate store team leader -- about getting back
23 into dress code, and if they wouldn't, sending them home,
24 about how long was this going on at the River Street store?

25 A Oh, months.

1 Q Months, it was?

2 A Yes.

3 Q Was the same process followed throughout? The
4 one you described?

5 A Yes, after the -- the only variations -- after
6 the second or third week, the 30-minute think-about-it went
7 away because we had already spoken to team members multiple
8 times. By the time I called someone into the office, it
9 was "Are you going to be in dress code today?" and it was a
10 yes or no answer, they move forward.

11 JUDGE SOTOLONGO: Just so that I understand. So prior
12 to this, before this, you had given the team members who
13 were wearing these Black Lives Matter masks 30 minutes to
14 comply -- in other words, to remove them and replace the
15 mask with something else that was in compliance with the
16 dress code.

17 THE WITNESS: Yes, sir.

18 JUDGE SOTOLONGO: And after 30 minutes, if they didn't
19 do it, they were told to punch out and go home, correct?

20 THE WITNESS: Yes, sir.

21 JUDGE SOTOLONGO: After about three weeks, the 30-
22 minute grace period, so to speak, was no longer in place,
23 is that correct?

24 THE WITNESS: That is correct. Because --

25 JUDGE SOTOLONGO: All right.

1 BY MR. FERRELL:

2 Q And, Scott, just to be clear, even during the
3 period when you were telling them they're going to have 30
4 minutes to think about it, did most people take the 30
5 minutes or did some of them tell you in a minute or five
6 minutes what they were going to do?

7 MR. PETERSON: Objection. Asked and answered.

8 JUDGE SOTOLONGO: Overruled.

9 Go ahead.

10 THE WITNESS: Okay. I don't recall anyone taking the
11 full 30 minutes, sir.

12 BY MR. FERRELL:

13 Q But in the early weeks you would offer --

14 A Yes.

15 Q -- them to take 30 minutes.

16 A Yes.

17 Q And we talked about the fact that the time and
18 attendance policy -- they were being issued points, because
19 time and attendance was now back in effect. Do you
20 remember talking about that a minute ago?

21 A Yes, sir.

22 Q And just so I'm clear, under time and attendance,
23 when they were being sent home for being out of dress code,
24 how many points were team members being assessed when they
25 got sent home?

1 A Going home early is one attendance point.

2 Q So they were each receiving one attendance point
3 for each time this happened?

4 A Yes, sir.

5 Q Scott, aside from wearing Black Lives Matter
6 masks while working in the store, did you observe any team
7 members who, after they left the store -- sent home or just
8 off work -- participating in protests outside the store?

9 A Yes, sir.

10 Q There were community protests going on outside
11 the store? On some days.

12 A Yes, sir.

13 Q And on some days team members participating?

14 A Yes, sir, that's correct.

15 Q And this is when they were not working for the
16 store?

17 A Yes, sir, they were off the clock.

18 Q Was anyone disciplined in any way for
19 participating in those protests?

20 A No, sir, they were not.

21 Q Did you on occasion have team members who wore
22 their Black Lives Matter mask while they were on break?

23 A As long as they were punched out, they could do
24 whatever they want -- they were off the clock. So for
25 their 30-minute lunch period, yes.

1 Q So their 30-minute clocked-out lunch period, some
2 team members might put on their Black Lives Matter mask
3 during lunch?

4 MR. PETERSON: Objection. Foundation and calls for
5 speculation.

6 JUDGE SOTOLONGO: Overruled. You can answer if you
7 can answer the question. Do you understand the question?

8 THE WITNESS: Yes, I understand the question.

9 JUDGE SOTOLONGO: Then go ahead, you can answer.

10 THE WITNESS: Yes, we have had team members who were
11 punched out and they would put on a Black Lives Matter
12 mask.

13 JUDGE SOTOLONGO: Now, normally, Mr. Duncan, when team
14 members punched out -- let's say, to go to lunch -- that
15 30-minute lunch break, is that -- is that what they got?

16 THE WITNESS: Yes, sir.

17 JUDGE SOTOLONGO: Do they typically go to a breakroom
18 inside the store, away from the public area of the store,
19 or they would go outside to have lunch elsewhere, or both,
20 or --

21 THE WITNESS: Because of COVID, very few people went
22 into the actual breakroom. The majority of people would
23 eat lunch in their cars.

24 JUDGE SOTOLONGO: They just left the store?

25 THE WITNESS: Yes, there was --

1 JUDGE SOTOLONGO: Went outside?

2 THE WITNESS: There was a maximum -- I believe it was
3 three or four people in the breakroom, so there wasn't much
4 room in there.

5 JUDGE SOTOLONGO: Okay. But I guess my -- I guess the
6 point of my question was, when these employees were on
7 their lunchbreaks and the mask policy was no longer in
8 force, were these employees still walking around the store
9 with their masks on or they had just left the store
10 altogether?

11 THE WITNESS: Sometimes they would walk around the
12 store with their masks on.

13 JUDGE SOTOLONGO: But as long as they were not -- now,
14 when -- another question in that regard. When they were on
15 their breaks, were they still wearing their Whole Foods
16 aprons and -- or had they taken those --

17 THE WITNESS: No, they were supposed to take them off,
18 sir.

19 JUDGE SOTOLONGO: Hm?

20 THE WITNESS: No, they have to take them off, sir.

21 JUDGE SOTOLONGO: Okay. So during the breaks they
22 take off their Whole Foods aprons and other identifying --

23 THE WITNESS: Yes, sir.

24 JUDGE SOTOLONGO: Okay. So a person -- a member of
25 the public that would see them would not necessarily know

1 that these persons -- this person wearing the mask was an
2 employee of Whole Foods, would that be correct?

3 THE WITNESS: That would be correct, sir.

4 JUDGE SOTOLONGO: Unless they already knew them --

5 THE WITNESS: Yes, sir.

6 JUDGE SOTOLONGO: Okay. I see. All right. Go ahead.

7 BY MR. FERRELL:

8 Q And, Scott, were any employees who -- walking
9 through the store or in the store, off the clock, wearing a
10 Black Lives Matter mask -- was anyone disciplined for that?

11 A No, sir, they were not.

12 Q And the judge had just asked you to -- to
13 somebody who doesn't know them, if they're not in uniform,
14 they might appear to be a customer wearing a Black Lives
15 Matter mask.

16 A Yes, sir.

17 Q Did we have other customers who would come into
18 the River Street wearing Black Lives Matter mask?

19 A Absolutely, sir, yes.

20 Q Did we have team members who showed up to work
21 wearing their Black Lives Matter mask and then would switch
22 into a compliant mask -- one compliant with the dress code,
23 and keep working?

24 A Yes, sir.

25 Q Were they disciplined in any way?

1 A No, sir, they were not.

2 Q Did you become aware at some point that Savannah
3 Kinzer was passing out Black Lives Matter masks at the
4 store to other team members?

5 A Yes, sir, I did hear that.

6 Q Did you speak to Ms. Kinzer about that or
7 discipline her in any way?

8 A I did not.

9 Q During the summer of 2020 do you recall seeing or
10 it being reported to you by other managers that Ms. Kinzer
11 would flip her mask around, and sometimes she would be in
12 the Black Lives Matter mask and then she would switch it
13 back to being compliant?

14 A Yes, sir, I was told that.

15 Q Did you speak to Ms. Kinzer about that or
16 discipline her in any way for that?

17 A I did not, sir.

18 Q Scott, do you recall a team member in the River
19 Street complaining to you at some point about someone
20 wearing a Blue Lives Matter mask?

21 A It was not a mask, it was actually -- we have
22 undercover security to catch shoplifters. Similar to mall
23 security. I remember the incident. The young lady's name
24 was Jo Jo, and she had the Blue Lives patch, flag --
25 whatever it's called -- visible on her shirt. I had a team

1 member -- I don't remember if it was Kirby or Shae -- could
2 have been -- I don't remember which of the two of them it
3 was.

4 Q Kirby Burt or Shae Morgan?

5 A Yes.

6 They said that they found that -- they were
7 uncomfortable with it. I immediately went up to the
8 security guard, even though they're not a Whole Foods
9 employee but they are working for us. I asked her if she
10 could cover it or change, which she did. She covered it
11 with her sweater and she went back to work.

12 Q Scott, when it became public that we weren't
13 allowing team members to work in Black Lives Matter masks,
14 we talked some about there were protests outside by the
15 community, right?

16 A Yes, sir.

17 Q In fact, I think, on some days there was TV crews
18 outside, right? Or press anyway.

19 A That is correct, sir.

20 Q Did you talk -- have an occasion to talk to
21 customers or people who represented themselves to be
22 customers or community members about Whole Foods'
23 enforcement of its dress code to not allow the Black Lives
24 Matter mask to be worn?

25 A At the very, very beginning, there were phone

1 calls every ten, 15 minutes, all day long.

2 Q And how long were those calls in that volume
3 coming in every ten or 15 minutes?

4 A Probably -- I would say a comfortable number is
5 at least the very first three weeks from when it first
6 started.

7 Q And when these calls would come in, would you
8 answer them? Or who's answering them?

9 A Unless a call is specifically addressed to me,
10 what would happen is, someone would call the store, store
11 support customer service would take the call, and if they
12 wanted to speak to the store manager, they would page
13 Shifty -- "pick up, Shifty."

14 Q They paged Shifty?

15 A Yes.

16 Q And that means any --

17 A Whoever's in charge of the store at that moment.
18 And at any given time -- like we spoke earlier, there are
19 times where Danny and I are both in the store at the same
20 time. So whomever grabs the call first is the one who's
21 going to take the call.

22 Q So did you take a number of these calls then in
23 that three-week period or so?

24 A Oh, yes.

25 Q And what was the general tenor of these calls?

1 A They were upset that we wouldn't let team members
2 wear the masks. A lot of it was just informing the public
3 people were misinformed. They thought that we were firing
4 these team members for wearing the mask. They wanted to
5 know why they couldn't wear the mask.

6 Q What would you tell them in response?

7 A I would tell them it's Whole Foods dress code
8 policy, and it's the same policy across the entire company.

9 Q What did you tell them about whether people were
10 being fired for wearing the mask?

11 A I told them I couldn't get into detail about how
12 Whole Foods counsels team members but I could tell them
13 that no one has lost their job for wearing a Black Lives
14 Matter mask.

15 Q Did you have occasion where some of these
16 community members -- these calls that you're answering --
17 people who were, say, emotional -- they sounded upset?

18 A They were very upset. They were threatening.

19 Q When you say "threatening," what types of
20 comments would you be told --

21 MR. PETERSON: Objection. This is very vague and also
22 no foundation.

23 JUDGE SOTOLONGO: Well, not vague. He's going to tell
24 us exactly what kind of things say --

25 You're going to tell us -- or, I anticipate the next

1 question exactly to tell us what kind of threats, or what
2 kind of -- so it's not vague in that sense.

3 As far as foundation, unless Mr. Duncan can -- has a
4 photographic memory, can tell us, you know, the time, date,
5 minute and name of the person who called on each occasion
6 -- which I doubt any human being could do -- the foundation
7 is going to be -- that's right -- I mean -- unless we can
8 tell -- unless you can know the -- give us particular
9 examples of a particular date or a particular name of a
10 person who called and issued a --

11 Can you do that?

12 THE WITNESS: A specific date and a name? No.

13 JUDGE SOTOLONGO: Yeah.

14 THE WITNESS: But I have recall -- I do recall one
15 call that was very detailed.

16 JUDGE SOTOLONGO: Can you tell us about it?

17 THE WITNESS: I can tell you about that particular
18 call.

19 JUDGE SOTOLONGO: Please do.

20 THE WITNESS: Okay. So it was a call --

21 JUDGE SOTOLONGO: Okay. First of all, foundation --
22 about how long after the employees first started wearing
23 these Blue Lives -- excuse me -- Black Lives Matter masks
24 did you receive this phone call?

25 THE WITNESS: The second week.

1 JUDGE SOTOLONGO: The second week. Okay. And about
2 what time of the day -- you were in your office?

3 THE WITNESS: I was in my office.

4 JUDGE SOTOLONGO: And about what time of the day,
5 approximately?

6 THE WITNESS: Midday.

7 JUDGE SOTOLONGO: Midday.

8 THE WITNESS: Afternoon.

9 JUDGE SOTOLONGO: Okay. And was this a man or a woman
10 on the phone?

11 THE WITNESS: It was a man.

12 JUDGE SOTOLONGO: Okay. And did he give you his name?

13 THE WITNESS: He did not.

14 JUDGE SOTOLONGO: Okay. Could you tell us what he
15 said and what you said to him, if anything?

16 THE WITNESS: Yes, sir. So the call came through. It
17 was specifically to me, so I took the call. They paged
18 "Scott, take line whatever." I picked up the phone, and
19 the caller was a male, he asked me my name, I told him my
20 name. He said how could I -- I'm going to swear -- how
21 could I fucking send his brothers home, why can't they wear
22 the goddamn mask, I wish I could punch you in your fucking
23 face.

24 I went in -- I explained to him the same thing that I
25 explained to a lot of other calls -- it's out of dress

1 code, there's nothing I can really do about it, I have a
2 job to do, I have a family to feed. Again, the caller --
3 "what the fuck, my brothers have families to feed too,
4 you're sending them home, you're taking money from them."

5 Then the caller went on to say, "I know you drive a
6 blue car, I'll see you soon." Then he hung up on me.

7 Oh, actually, I'm sorry, there's one part that -- this
8 is what spooked me and upset me. Aside from calling me a
9 racist, the gentleman said that if I don't think Black
10 lives matter, my life doesn't matter.

11 JUDGE SOTOLONGO: All right. And -- okay, so this --
12 obviously, this phone call, because of its threatening
13 nature, stuck in your mind.

14 THE WITNESS: Yes, sir.

15 JUDGE SOTOLONGO: Okay. Did you receive other,
16 similar calls throughout this period that were similarly
17 threatening or perhaps less so?

18 THE WITNESS: Less so. That was the most threatening
19 one.

20 JUDGE SOTOLONGO: All right. But they were
21 nonetheless upsetting, I would -- is that correct?

22 THE WITNESS: They would call and I would be called a
23 racist -- multiple phone calls were "if Black lives don't
24 matter, your life doesn't matter," and then I hang up.

25 BY MR. FERRELL:

1 Q So, Scott, you talked about multiple calls about
2 racism, multiple calls "if Black lives don't matter, your
3 life doesn't matter," but the one call that Judge Sotolongo
4 was asking you about -- it stuck with you the most. I
5 believe you said that call wasn't for a general Shifty --
6 the shift manager -- it was specifically for you?

7 A Yes, sir.

8 Q And that call also referenced "I know what kind
9 of car you drive"?

10 A Yes, sir.

11 Q And that caller also said "I'll see you soon"?

12 A Yes.

13 Q And what did you do after that call?

14 A I was very concerned. I believe it was Terry
15 Marcone that I called, who --

16 Q Who is Terry Marcone?

17 A She is in charge of loss prevention, safety for
18 the stores, things like that. I reported to her what
19 happened. She said that she was going to call the police
20 on my behalf. Shortly thereafter -- I believe it was the
21 next day -- someone from the Cambridge Police Department
22 just called to check and see how I was doing.

23 Q Did you speak with somebody from Cambridge
24 Police?

25 A Yes, sir, the detective who called me.

1 Q It was a detective who called you?

2 A Yes.

3 Q Scott, I want to ask you about -- we talked about
4 some discipline, some attendance points, and a lot of
5 things people didn't get disciplined for, but I do want to
6 talk about discipline that was issued in this case to Ms.
7 Kinzer.

8 MR. FERRELL: Do you have GC 16?

9 MS. DOHERTY: Mm-hm.

10 MR. FERRELL: Permission to approach, Judge?

11 JUDGE SOTOLONGO: Please do.

12 BY MR. FERRELL:

13 Q Scott, I've handed you what's in evidence as
14 General Counsel's Exhibit 16.

15 Document you have should in the lower right-hand
16 corner have a Bates number that says "WFM page 225." Do
17 you see that?

18 A Yes, I do, sir.

19 Q Looking at this, is that your initial at the
20 bottom center of the page?

21 A Yes, it is, sir.

22 Q The "SD," that's you?

23 A Yes.

24 Q And if you look on the second page of this
25 exhibit, page 226, it says "store facility team leader's

1 initials." Is that your initial again there?

2 A Yes, it is, sir.

3 Q It looks like this was administered on July 8,
4 2020. Is that the date?

5 A Yes, sir, that's the date on the document.

6 Q Looking at this document, Scott, do you recognize
7 it?

8 A Yes.

9 Q What is it?

10 A This is a verbal warning to Savannah for
11 attendance points.

12 Q I see Ms. Kinzer's name at the top, under "team
13 member's name." Is that where you're getting that?

14 A Yes, sir.

15 Q "Issued by" -- it looks like that says Merisa
16 Abotchie. Is that how you read that?

17 A Yes, sir, I do.

18 Q I think you testified earlier she was the team
19 leader for customer service?

20 A That is correct.

21 Q And what is this verbal warning, as you call it,
22 for?

23 A She exceeded five points in less than 30 days.

24 Q And under the attendance policy we went through
25 earlier, that generates you a verbal warning under just the

1 attendance points, right?

2 A That is correct, sir.

3 Q If you turn to page 3 of this exhibit -- page 27?

4 A Yes, sir.

5 Q What is -- do you recognize this? And can you
6 tell us what it is?

7 A Yes, sir. This is a final written warning being
8 issued to Savannah by Merisa. And this is for a no-call
9 no-show, which is a major GIG infraction.

10 Q And what's the definition of a no-call no-show --
11 it's probably all in the name but just so we're --

12 A Yeah. You were scheduled to work, you did not
13 show up and you did not call to tell us that you were not
14 coming.

15 Q And what under the GIG is the disciplinary action
16 for a no-call no-show?

17 A It is an automatic final warning or, to
18 discretion, could lead to separation.

19 Q In the North Atlantic Region practice, where the
20 River Street is located, what's the standard practice for a
21 first no-call no-show?

22 A It would be a final warning. It would be final
23 warning.

24 Q And that's what was administered to Ms. Kinzer on
25 this date?

1 A That is correct.

2 Q Now, if you look on the next page of this --
3 again, next to your initials -- it's July 8, 2020. That's
4 the same date as her verbal warning?

5 A That is correct.

6 Q So did you attend the meeting where this was
7 given to Ms. Kinzer?

8 A Yes, I did.

9 Q Do you remember if Ms. Abotchie was also there?

10 A Yes, she was.

11 Q And why were you in the meeting on July 8 with
12 Ms. Kinzer about this?

13 A Typically, if it was just a verbal warning, I
14 wouldn't sit in on a warning such as that but because it
15 was a final warning -- that's pretty serious, I want to
16 make sure I'm there, I want to make sure team members
17 understand that in the next six months, if they have any
18 GIG infractions, no matter how small, you would be
19 separated. I think it's important that they hear that from
20 a member of store leadership.

21 Q And so -- just to go back to what you just said.
22 The implication of a final written warning, as this one is,
23 is any further corrective counseling action will result in
24 discharge?

25 A That is correct.

1 Q If you look on page 233, the last page of this --

2 JUDGE SOTOLONGO: What exhibit is that again, Mr.

3 Ferrell?

4 MR. FERRELL: I'm sorry, say it again?

5 JUDGE SOTOLONGO: What exhibit is that again?

6 MR. FERRELL: I'm sorry. It's General Counsel's 16.

7 JUDGE SOTOLONGO: Thank you.

8 BY MR. FERRELL:

9 Q And, Scott, if you turn to page 233, the last
10 page of the exhibit.

11 A Yes, sir.

12 Q Do you recognize this page, and can you tell us
13 what it is?

14 A Yes, this is a separation form issued to
15 Savannah.

16 Q Now, in the explanation of the reason, it says
17 "as of July 18." Do you see that?

18 A Yes, sir.

19 Q Now, I note your signature on the bottom --
20 there's a different date -- July 22. Why is that?

21 A I did not have this paper with me the day that
22 Savannah was separated. I verbally told her she was
23 separated.

24 Q And on July 18, the date -- was July 18 the
25 actual date of separation for Ms. Kinzer? The day you met

1 with her?

2 A Yes.

3 Q Can you tell us what happened on that day?

4 A On that day she was -- she was late. It was
5 brought to my attention by Shae Morgan. She came to my
6 office, she said that --

7 Q And "she" being Shae Morgan?

8 A Shae Morgan came to my office, she told me that
9 Savannah had some issue with her bike and she was going to
10 be late, and she said that this would give her enough
11 points to warrant a written warning. And Shae asked if I
12 could ignore giving her that point because she told me if
13 she got the written warning that she would be separated,
14 because she's on a final. I told her we cannot forgive the
15 point. In our region, the only time points would be --
16 other than when they suspended all points, the only time
17 points would be forgiven is in extreme weather, the trains
18 weren't running, and that would be more of a regional thing
19 than an individual store decision just to not give a point,
20 not to give it.

21 Q Just to give somebody -- an individual an extra
22 point, basically, right?

23 So Shae Morgan came and told you Savannah's going
24 to be late and also that this point's going to result in
25 her separation.

1 A Yes, sir.

2 Q And walk me through again why this point would
3 have resulted in her separation.

4 A So she got the final warning for a no-call no-
5 show. She also had enough points to get a verbal, which,
6 in all actuality, could have led to a separation there but
7 because she didn't have the heads up, I didn't feel it was
8 fair to separate her at that point.

9 So from the time she got her verbal, she got four
10 more points in less than 60 days, which would go right to a
11 written warning, which is the next step, and a counseling
12 statement. And since she was already --

13 Q The next step under just the attendance policy.

14 A Yes, sir.

15 Q Okay. Go ahead.

16 A And since she was already on a final warning, a
17 written warning would be the next step in -- towards
18 separation.

19 Q If you still have -- I think you still have
20 General Counsel's Exhibit 3 in front of you?

21 Tell me if you can find it.

22 A Yes, I have it, sir.

23 Q If you'd turn to page 95 of 158?

24 This is the counseling expectations chart that we
25 talked about before.

1 A You said 95, sir?

2 Q Yes.

3 A Yep. I have it.

4 Q Ninety-five of 158. You see the counseling
5 expectations chart?

6 A Yes, sir.

7 Q And, Scott, I just want to make sure we're all
8 clear what you're saying. Under the five points in 30 days
9 -- that's what Ms. Kinzer received on July 8, right?

10 A That is correct, sir.

11 Q In addition to her final warning, which was for a
12 no-call no-show -- for something else, right?

13 A That is correct.

14 Q She then, on July 18 -- that was her fourth
15 attendance point that resulted in four more points in 60
16 days after passing the first five points?

17 A That is correct.

18 Q And so under this counseling chart on page 95,
19 that would result in a written warning?

20 A That is correct.

21 Q But since you're already on a final warning, any
22 further corrective action results in discharge.

23 A That is correct.

24 Q Now, after you spoke to -- after Ms. Morgan --
25 Shae Morgan brought this to your attention and you told her

1 "we can't forgive the point," what did you do?

2 A We waited till she actually showed up. I don't
3 think she was in the store. I don't recall her being in
4 the store when Shae first said that. It was when Savannah
5 called to say she was going to be late.

6 Q She was still on her way to the store, as far as
7 you knew?

8 A Yes, sir.

9 Q Did you speak with TMS at all?

10 A Yes, I did. I called Jamie Zito, as is, you
11 know, protocol if you're -- if I'm looking to separate --
12 if I'm looking to move forward with separation, I always
13 check in with TMS. I called Jamie, reminded him of the
14 situation -- she's already on a final, she has enough
15 points for a written, I support separation, you know, is
16 that the direction we want to go. He said yes, and that's
17 what we did.

18 Q At what point did you speak with Ms. Kinzer?

19 A I don't recall how much longer after that
20 decision was supported but --

21 Q Supported by TMS, you mean?

22 A Yes, sir.

23 It wasn't long after, that I recall.

24 Q And where did you speak to Ms. Kinzer?

25 A In my office.

1 Q Okay. Do you recall if anybody else was present?

2 A I don't recall. I'm pretty sure someone was but
3 I can't recall exactly who it was.

4 Q So when you're speaking with Ms. Kinzer in your
5 office -- tell us about that conversation. What did you
6 say to her, what did she say to you?

7 A I told her that she was late and she was due for
8 a written warning, which means she's going to be separated
9 because she's already on a final.

10 Q Let me -- I'm going to show you what I'm marking
11 as Respondent's Exhibit 45.

12 MR. FERRELL: Counsel.

13 (Respondent's Exhibit 45 marked for identification.)

14 BY MR. FERRELL:

15 Q Scott, you have before you what's been for
16 identification as Respondent's Exhibit 45. Do you
17 recognize this?

18 A Yes, sir.

19 Q What is it?

20 A It's an attendance tracker.

21 Q We were talking earlier about attendance trackers
22 that are maintained by team leaders and associate team
23 leaders. Is this the document you're talking about?

24 A Yes, sir, it is.

25 Q At least it's a printed version for Ms. Kinzer?

1 A It is a printed version, sir, yes.

2 Q I think you said earlier each department
3 maintains their own spreadsheet?

4 A That is correct.

5 Q So this one -- this printed portion has Ms.
6 Kinzer up in the top right-hand corner?

7 A Yes.

8 Q If you turn to the second page of it, can you
9 tell us what we're looking at in page 2 of the exhibit?

10 A It's the dates she received points and any kind
11 of corrective action and why.

12 Q And do you make the entries in this spreadsheet?

13 A No, sir, I do not.

14 Q Who would have made them for Ms. Kinzer?

15 A That would have -- for Ms. Kinzer, it would have
16 been either Merisa, Shae Morgan or Luc.

17 Q And Merisa would be Merisa Abotchie, the team
18 leader for customer service?

19 A That is correct, sir.

20 Q Or Shae Morgan, the associate team leader, or
21 Luc, the associate team leader?

22 A That is correct, sir.

23 Q So if we're looking at the July 5, 2020, entry,
24 there's a note under "reason." It says "NCNS." Do you
25 know what that denotes?

1 A Yes. No-call no show.

2 Q That's the date she actually incurred the no-call
3 no-show?

4 A Yes, sir.

5 Q And then the final warning for that was
6 administered to her on July 8?

7 A That is correct.

8 Q And if you're looking after July 8, the dates I
9 wanted to focus on --

10 A Yes.

11 Q The four additional points she accumulated after
12 the final warning -- on July 8 do you recall what she got -
13 - was sent home for a point for?

14 A If she was sent home and it was Savannah, it was
15 because she was out of dress code.

16 Q And then the next three entries -- July 10, July
17 12 and July 18 -- it looks like those are three instances
18 of being late inside the eight days.

19 A That is correct.

20 Q And those tardies are then what result in -- what
21 would be a written warning but ends up being a separation,
22 because she's on final warning, is that right?

23 A That is correct, sir.

24 Q When you told Ms. Kinzer this, when you were
25 meeting on July 18 in your office, what did she say in

1 response? Or what'd she say after you informed her?

2 A She wasn't upset because she was separated. I do
3 recall her -- I don't recall exactly how it was said but
4 she had asked if I had known -- I think, something about a
5 lawsuit, and I told her I wasn't -- I had no idea what she
6 was talking about. And then she presented me -- I can't
7 recall if she showed me a piece of paper or just showed me
8 on her phone. And I briefly looked at it. I didn't really
9 understand what I was looking at. And I don't recall if --
10 yeah, she asked me if wanted her to email it to me so I had
11 it. And I said yes. And then she did.

12 Q Did she email it to you while she's sitting
13 there?

14 A Yes, sir.

15 Q And what happened after that, anything?

16 A After that I told her she was separated. When
17 team members are separated, we typically ask them to leave
18 the building right away. We explain they're not banned
19 from the store -- happy to come back any time -- but in the
20 moment, you know, we don't want to be disruptive, we don't
21 want to -- you know, every -- go around to each individual
22 department and make a fuss or anything like that, she's
23 just asked to please leave the building. And that's what
24 she did. There was no issue with her walking out. And
25 going home for the day.

1 MR. FERRELL: No further questions at this time.

2 Oh, I would like Your Honor to move Respondent's 45
3 into evidence.

4 JUDGE SOTOLONGO: All right. Any objection to
5 Respondent's 45?

6 MR. PETERSON: Just a quick voir dire?

7 JUDGE SOTOLONGO: Sure.

8 VOIR DIRE EXAMINATION

9 BY MR. PETERSON:

10 Q Have you seen this exhibit before?

11 A Have I seen this exhibit before?

12 Q Yeah.

13 A Yes.

14 Q When did you see it?

15 A I saw it this morning.

16 Q This morning's the first time you saw this
17 exhibit?

18 A Yes, sir.

19 Q And you're not sure who made these entries?

20 A No, sir.

21 Q And I guess the first page is a calendar, and I
22 guess it's -- has a bunch of zero points under each month.
23 Do you see that?

24 A Yes.

25 Q What -- how come there aren't any -- do you know

1 why there's no points reflected --

2 A They can use either --

3 Q (Indiscernible; voice drop at 1:58:10).

4 A So there's -- they can use either side of this,
5 if they want to, and the points are also on Kronos, which
6 is checked electronically.

7 Q Do these two documents come -- how are these two
8 documents -- page 1 and page 2 -- are they -- how are they
9 stored?

10 A They're stored -- each team leader has a folder
11 where they have one of these for each team member.

12 Q Like an electronic folder?

13 A Yes, sir.

14 Q Are these two separate docu-- like are these --

15 A It rolls.

16 Q -- kept separately?

17 A It's on the same sheet. So if you scroll down --

18 Q Oh, the calendar.

19 A Yeah, if you scroll down, they're together.

20 Q Calendar's on top and this is on the bottom?

21 A And team members have access to this any time
22 they ask to see it.

23 MR. PETERSON: I object on the grounds that the
24 witness is not familiar with this document and cannot
25 authenticate the contents thereof.

1 JUDGE SOTOLONGO: Yeah, that would appear to be
2 correct. I don't think this witness --

3 Do you know who prepared this document?

4 THE WITNESS: It's maintained by the team leader and
5 her two associates.

6 JUDGE SOTOLONGO: Is this something that's normally
7 printed or is just kept electronically?

8 THE WITNESS: It's kept electronically but if a team
9 member wants a copy of it, it's printed out and given to
10 them. At any time.

11 JUDGE SOTOLONGO: So this is not something, for
12 example, that -- this document in its present form wouldn't
13 be something that would be kept in Ms. Kinzer's personnel
14 file, for example?

15 THE WITNESS: Yes, that should be in her personnel
16 file. I would understand it to be.

17 MR. PETERSON: And I would say that we subpoenaed Ms.
18 Kinzer's personnel file, and this was not produced.

19 MR. FERRELL: This was produced --

20 MS. DOHERTY: Objection.

21 MR. FERRELL: -- to counsel. All of the attendance
22 trackers were produced to counsel -- General Counsel.

23 It was produced, it's in Excel. I believe it --

24 MS. SCHAEFER: It's in the Excel -- it's an Excel
25 spreadsheet that we produced.

1 MR. FERRELL: This is just printed from the
2 production. It is the Excel tracker -- I mean, all it is
3 is an attendance point tracker.

4 MS. SCHAEFER: It was attached to --

5 MR. PETERSON: Production all had -- was all Bates
6 numbers, and there's no Bates number on there.

7 MS. SCHAEFER: Well, it's because you can't Bates
8 number an Excel spreadsheet. I just printed this off of
9 the Excel spreadsheets that we provided, so -- it was in --
10 it's the Excel document, has all of the employees'
11 attendance trackers. So the Excel document itself is Bates
12 numbered. And this is one of the reports within the Excel
13 document that was produced.

14 MR. PETERSON: But whether -- was it in her personnel
15 file?

16 MS. SCHAEFER: No, it was attached to an email from --
17 that Merisa Abotchie sent. There are multiple Excel
18 spreadsheets that were produced that were attached to said
19 email from Ms. Abotchie, tracking employees' attendance.

20 MR. PETERSON: Okay. Yeah, same objection.

21 MR. FERRELL: And, Your Honor, it's the business
22 record that's just maintained in the store to track
23 attendance points. The attendance points that are really -
24 -

25 JUDGE SOTOLONGO: All right.

1 MR. FERRELL: -- at issue, the --

2 JUDGE SOTOLONGO: All right. As a business record, I
3 will admit it.

4 MR. FERRELL: Thank you, Your Honor.

5 JUDGE SOTOLONGO: Let me ask you this, Mr. Duncan --
6 the summary of points -- yeah, the second page of this
7 exhibit --

8 THE WITNESS: Yes.

9 JUDGE SOTOLONGO: -- shows the dates that Ms. Kinzer
10 was penalized a point, and so forth, and the reason
11 therefor. Is that something that you're familiar with?

12 THE WITNESS: Yes, sir.

13 JUDGE SOTOLONGO: And is this accurate?

14 THE WITNESS: Yes, sir.

15 JUDGE SOTOLONGO: All right. I'll admit it.

16 (Respondent's Exhibit 45 admitted into evidence.)

17 MR. FERRELL: No further questions at this time, Your
18 Honor.

19 JUDGE SOTOLONGO: All right. I have a few questions
20 but maybe -- I'll just wait for mister -- maybe Mr.
21 Peterson will do the job for me. And if not, I will ask
22 the questions at the end of his examination.

23 So go ahead, Mr. Peterson.

24 MR. PETERSON: Your Honor, may I request a recess? I
25 have some -- there's a significant amount of subpoena

1 production, and now knowing who this witness is and what
2 they've testified to, I'd like to prepare some exhibits.

3 JUDGE SOTOLONGO: How much time do you need?

4 MR. PETERSON: I would appreciate 45 minutes.

5 JUDGE SOTOLONGO: Okay. It's 11:15, so you have till
6 noon. Okay. Then we'll continue, and then we'll take a
7 lunch break after your -- sometime after you begin your
8 cross-examination.

9 MR. PETERSON: Sure.

10 JUDGE SOTOLONGO: Okay. Very well.

11 MR. FERRELL: Thank you, Your Honor.

12 JUDGE SOTOLONGO: Okay.

13 Actually, you know what, I think it's just better to -
14 - let's make it -- come back at 12:30. That will give us
15 extra time for lunch. So we'll come back at 12:30, and
16 then we'll start with -- and just keep going. Okay? So --

17 Do we have it on the record?

18 All right. So we'll come back in an hour and 15
19 minutes, and that way we'll take our lunch break during
20 that time.

21 That's like five minutes late, so don't rely on that
22 clock.

23 [OFF THE RECORD]

24 [ON THE RECORD]

25 JUDGE SOTOLONGO: All right, Mr. Peterson, are you

1 ready to proceed?

2 MR. PETERSON: Yes. Thank you, Your Honor.

3 JUDGE SOTOLONGO: Okay. Let's go back on the record.

4 All right. We're back from break, and now General
5 Counsel is going to proceed with his cross-examination.

6 Mr. Peterson?

7 MR. PETERSON: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. PETERSON:

10 Q Good afternoon, Mr. Duncan.

11 A Good afternoon.

12 Q I'm Matt Peterson. I'm the lawyer for the
13 National Labor Relations Board. I'm going to be asking you
14 some follow-up questions and questions about the events in
15 the summer of 2020 related to the Black Lives Matter masks.

16 You testified that you reached out to Team Member
17 Services because you weren't sure whether the dress code
18 policy applied to the Black Lives Matter face masks, is
19 that correct?

20 A I was unsure if that was acceptable with our
21 dress code, that is correct.

22 Q The dress code was ambiguous? You weren't able
23 to tell for sure whether or not it would apply to Black
24 Lives Matter masks?

25 A I had never seen that before, never come across

1 that in my time, so, again, I wasn't clear, so I reached
2 out for clarity.

3 Q You or the other employees had been wearing masks
4 with various images on them prior to the Black Lives Matter
5 masks, is that correct?

6 A It was brought to my attention by another team
7 member, and the question was asked.

8 Q But you don't recall seeing anyone wearing
9 cartoons or other messages on their face masks when you did
10 your laps and walks -- you walked around?

11 A I don't recall. I don't recall any messaging.

12 Q Do you recall images of any kind?

13 A Team members had patterns.

14 Q Patterns?

15 A That I remember seeing.

16 Q Cartoons or anything of the like?

17 A I don't recall specifically.

18 JUDGE SOTOLONGO: Are you talking just about masks or
19 anywhere on the body?

20 MR. PETERSON: I'm currently talking about masks.

21 JUDGE SOTOLONGO: Okay. Very well. Just to clarify.

22 And, Mr. Duncan, I'm going to ask you a little bit too
23 -- project your voice a little more so that they all can
24 hear you, because with -- you know, the Plexiglas in front
25 of you kind of blocks the -- I can hear you fine but I'm

1 afraid maybe the folks at the table might not be able to
2 hear you, so --

3 THE WITNESS: Okay, sir. Yes.

4 JUDGE SOTOLONGO: You don't have to shout but just
5 project your voice so that we can hear you. These
6 microphones do not amplify your voice, they simply record,
7 so --

8 THE WITNESS: Okay. I understand, sir.

9 JUDGE SOTOLONGO: Thank you.

10 THE WITNESS: Yes, sir.

11 BY MR. PETERSON:

12 Q So you don't recall specifically other types of
13 images on masks?

14 A I don't recall.

15 Q What about other kind of adornments -- buttons,
16 pins, patches -- did you notice any people wearing any of
17 those at work?

18 A I don't recall addressing that.

19 Q You don't recall?

20 Do you know whether the dress code policy applied
21 to pins?

22 A I recall there being something in it. I don't
23 recall off the top of my head exactly what is stated.

24 Q Do you recall it being brought to your attention
25 that employees had requested to wear Black Lives Matter

1 pins at work?

2 A I don't recall people requesting to wear pins.

3 Q Do you recall being copied on a email discussion
4 with Daniel Langley and Eliza Brown about pins, about June
5 7th of 2020?

6 A I don't recall the conversation.

7 MR. PETERSON: Permission to approach the witness?

8 JUDGE SOTOLONGO: Right. Go ahead.

9 MR. PETERSON: I have what's marked as General
10 Counsel's Exhibit 45.

11 (General Counsel's Exhibit 45 marked for identification.)

12 THE WITNESS: Thank you.

13 JUDGE SOTOLONGO: Thank you.

14 BY MR. PETERSON:

15 Q Do you recognize that document?

16 A Reading it now, yes. I was copied on it.

17 Q And so do you now recall on June 7th it being
18 brought to your attention that some of the team members had
19 been asking if they could wear Black Lives Matter pins?

20 A And as I'm reading this, it seems like they went
21 up to Danny, and Danny was asking for clarity with Eliza
22 and cc'd me on the email. I don't recall specifically any
23 team member coming directly to me. I don't recall it.

24 Q Right, yeah, I didn't ask if anyone brought --
25 but it was brought to your attention at least through this

1 email?

2 A Yes, I'm on -- I'm CC'd on this email, yes.

3 Q Okay. And do you recall what the response was?

4 A I don't recall, sir.

5 Q Do you see where -- under the subject "Black
6 Lives Matter pin," I guess the second -- the first
7 paragraph in the second email, it says, "We can't, it's a
8 similar issue to other organizations and opening the door
9 for union activity"? Do you see that?

10 A Yes, I do.

11 Q Do you recall -- now do you recall receiving a
12 response to whether employees could wear Black Lives Matter
13 pins at work?

14 A Again, I don't recall the response.

15 Q So you don't recall -- you recall being copied on
16 -- that's your email address, is it not?

17 A Yes, sir, that's my email address.

18 Q Okay. And you see the response?

19 "We can't, it's a similar issue to other
20 organizations and opening the door for union activity"?
21 You see that?

22 A Yes, I see it.

23 Q But that doesn't refresh your recollection about
24 --

25 MR. FERRELL: Objection. Asked and answered.

1 Q -- your response?

2 JUDGE SOTOLONGO: Overruled. You can ask.

3 THE WITNESS: Can you repeat the question again, sir?

4 BY MR. PETERSON:

5 Q Yeah, does that -- reading that line, does that
6 refresh your recollection as to whether a response was
7 given from Eliza Brown --

8 A Yes, reading --

9 Q -- about the question about pins?

10 A Reading this, that is Eliza's response to Danny's
11 question.

12 Q Okay. You recall that response now?

13 A I'm reading it, yes.

14 MR. PETERSON: All right. Move for the admission of
15 General Counsel's 45.

16 JUDGE SOTOLONGO: All right. Any objections?

17 MR. FERRELL: No objection, Your Honor.

18 JUDGE SOTOLONGO: All right. General Counsel's 45 is
19 admitted.

20 (General Counsel's Exhibit 45 admitted into evidence.)

21 BY MR. PETERSON:

22 Q You gave some testimony about the first time it
23 came to your attention that a group of employees were
24 wearing Black Lives Matter masks at work?

25 A Yes.

1 Q And I think you said you had wanted to meet with
2 them individually to discuss Jamie Zito's response to you
3 about your question?

4 A Yes, that's how I remember this.

5 Q And why did you -- why were you unable to meet
6 with them individually?

7 A I did meet with a lot of them individually.

8 Q Didn't some demand to meet in groups of two or
9 three?

10 A They didn't demand, they came into the office
11 together.

12 Q And you didn't prevent them from doing so?

13 A No, sir. With the sensitivity, I didn't.

14 Q And do you recall Savannah Kinzer standing out
15 amongst the most vocal of the employees wearing masks?

16 A Yes, sir.

17 Q And I think earlier you testified that they had
18 expressed that they were -- they wanted to support the
19 Black Lives Matter movement? Is that correct?

20 A They wanted to support the movement, yes.

21 Q And I think Respondent's counsel asked you if you
22 -- if they had brought up any -- I can't remember exactly
23 how he phrased it but workplace -- other workplace
24 concerns?

25 JUDGE SOTOLONGO: Could one of you get the back door?

1 Close the door, please.

2 THE WITNESS: Sorry, repeat that, sir?

3 BY MR. PETERSON:

4 Q Yeah, he asked you if you recall them bringing up
5 other workplace concerns?

6 A Yes, he asked me that.

7 Q And I believe you testified that they did not?

8 A To the best of my memory, they did not.

9 Q Do you recall them saying anything about masks
10 not applying to the dress code?

11 A Yes, sir, they claimed that.

12 Q Do you remember any reasons that they gave for
13 why they were asserting that it was not a violation of the
14 dress code?

15 A They felt that because Amazon had came out and
16 given a donation that Amazon was supporting it, that they
17 should be able to wear it.

18 JUDGE SOTOLONGO: Okay, so if I understand, you said
19 that they -- your reply was, because Amazon had contributed
20 funds to Black Lives Matter-associated groups that they
21 should also show their support by allowing the wearing of
22 these masks, is that correct?

23 THE WITNESS: That's how I understood it, sir, yes.

24 JUDGE SOTOLONGO: Okay.

25 BY MR. PETERSON:

1 Q And does -- the dress code policy allows for
2 Whole Foods brand-affiliated -- their -- adornments, isn't
3 that -- isn't that true? Doesn't the dress code say Whole
4 Foods-branded or Whole Foods-affiliated items are
5 permitted?

6 A I remember reading that in the dress code.

7 Q Did you respond to them when they -- to their
8 comments about it being a brand-affiliated message?

9 A I don't recall my exact words.

10 Q Do you recall sending an email to Eliza Brown
11 about your notes about these meetings?

12 A I sent Eliza Brown a lot of emails. I don't
13 recall specifically what the language is of it.

14 MR. PETERSON: Permission to approach the witness with
15 General Counsel's 41?

16 (General Counsel's Exhibit 41 marked for identification.)

17 JUDGE SOTOLONGO: Go ahead.

18 THE WITNESS: Thank you, sir.

19 JUDGE SOTOLONGO: This is 41?

20 MR. PETERSON: Yes.

21 BY MR. PETERSON:

22 Q Do you recognize that email dated June 26, 2020?

23 JUDGE SOTOLONGO: Give him time to read it.

24 MR. PETERSON: Sure.

25 (Pause.)

1 THE WITNESS: Yes, I read this.

2 BY MR. PETERSON:

3 Q And do you recognize this as the email you sent
4 to Ms. Brown describing what had happened?

5 A Yes, sir.

6 Q June 24th?

7 MR. PETERSON: Move for the admission of General
8 Counsel's 41.

9 JUDGE SOTOLONGO: Any objection?

10 MR. FERRELL: No objection.

11 JUDGE SOTOLONGO: Okay.

12 (General Counsel's Exhibit 41 admitted into evidence.)

13 BY MR. PETERSON:

14 Q And as you testified, employees continued the
15 process of wearing Black Lives Matter masks and choosing to
16 go home rather than to remove them? That process kind of
17 continued for a series of -- for a period of time?

18 A Yes, sir.

19 Q And were you -- you or your associate team
20 leaders sending updates to --

21 Were you guys sending each other email updates,
22 keeping track of who had been sent home?

23 A Yes, sir.

24 Q What was the -- who else had you -- who did you
25 communicate those emails to? Was that just within the

1 store or did you send those emails to your superiors?

2 A No, I communicated with Eliza Brown, just -- the
3 paper here.

4 Q Do you recall, prior to the June 24th meeting
5 with employees, whether you'd observed employees wearing
6 sports logos at work?

7 A I don't recall specifically.

8 Q Do you recall generally?

9 A Generally, if it was noticed, it was addressed.

10 Q It was addressed if it was noticed?

11 Any specific example -- you can't think of any
12 specific examples?

13 A Not off the top of my head.

14 Q And so is your testimony that any time it came to
15 your attention that somebody was wearing a sports logo
16 prior to June 24, 2020 that they were told to remove it or
17 go home?

18 A If someone had a question about dress code and
19 brought it to my attention, it was addressed.

20 Q Otherwise it was the responsibility of the
21 associate store team -- or, the associate team leaders and
22 the team leaders to enforce the dress code policy?

23 A If they were in the department, yes.

24 Q And you trusted them to handle that
25 responsibility?

1 A Yes.

2 Q Did you have any discussions with that leadership
3 team prior to June 24th specifically about sports logos or
4 other types of messages?

5 MR. FERRELL: I'm going to object -- relevance, Your
6 Honor. We don't have a disparate treatment application
7 claim. There's -- you know, we're not arbitrating -- you
8 know -- the dress code policy. I'm not sure where we're
9 going with this.

10 MR. PETERSON: We have a public image defense, as I
11 understand it, and a lack of consistent enforcement is
12 relevant --

13 JUDGE SOTOLONGO: I'll give you some leeway.

14 MR. PETERSON: -- bit of evidence.

15 JUDGE SOTOLONGO: I'll give you some leeway. Go
16 ahead.

17 BY MR. PETERSON:

18 Q And do you recall having any specific
19 conversations with your leadership team prior to June 24th
20 about being -- about applying the dress code to sports and
21 other logos?

22 A I don't recall that, no.

23 Q Do you recall that coming up after June 24th?

24 A Dress code, sir?

25 Q Yeah, dress code with respect to sports logos.

1 A Dress code in general, yes, sir.

2 Q And what about specific to sports logos, do you
3 remember that topic coming up?

4 A I don't remember specifically talking about
5 sports logos.

6 MR. PETERSON: Permission to approach the witness with
7 General Counsel's 43.

8 (General Counsel's Exhibit 43 marked for identification.)

9 BY MR. PETERSON:

10 Q There's two pages to that exhibit, so let me know
11 when you've had a chance to --

12 JUDGE SOTOLONGO: You mean, front and back?

13 MR. PETERSON: Right. Exactly, yeah. The back side
14 has the second page.

15 (Pause.)

16 THE WITNESS: What's your question, sir?

17 BY MR. PETERSON:

18 Q Yeah, do you recognize that document?

19 A After reading it, yes.

20 Q And what is it?

21 A It is an email reply from Rick Bonin. It has an
22 email from Rachel -- I don't really know who that is --
23 about an article that's coming out. It's an email from
24 Danny. It says, "We have been consistent with the
25 messaging in regards to dress code. I did have a team go

1 home because they changed their shirt this morning because
2 they had a Red Sox T-shirt on. We are holding everyone to
3 the standards that are provided to the GIG, and have talked
4 to our team leader group regarding the dress code. We have
5 been telling our TMs and TLs that no logos of any type can
6 be on a mask."

7 Q Do you recall being part of this email chain?

8 A Yes, I'm CC'd on it.

9 Q And does this refresh your recollection about a
10 specific application of the dress code policy to sports
11 after June 24th?

12 A Yes, Danny's stating that he had someone change
13 their shirt.

14 Q And I'm not sure if it came out on the record but
15 you -- Rachel Malish -- do you know who Rachel Malish is?

16 A I don't remember who she is. Seems like on her
17 signature she is the global public relations team member.

18 Q You aren't familiar with her though, apart from -
19 -

20 A I don't have --

21 Q -- emails and --

22 A I wouldn't have much interaction with someone
23 like that.

24 Q There's a reference in he email to the WFM PR
25 rapid response. Do you see that?

1 A What am I looking for, sir?

2 Q So, I guess the -- the top of the first page, the
3 cc, starts with Daniel Langley.

4 A Yes.

5 Q He's your -- he was your associate store team
6 leader at the time?

7 A Yes.

8 Q Right below that it says "WFM PR rapid response."
9 Do you see that?

10 A Yes, sir.

11 Q Are you familiar with what that is?

12 A I don't know specifically what it's called. I
13 know it has to do with media relations.

14 Q Okay.

15 MR. PETERSON: Move for the admission of General
16 Counsel's 43.

17 JUDGE SOTOLONGO: Any objection?

18 MR. FERRELL: I'd renew my objection on relevance
19 grounds, Your Honor.

20 JUDGE SOTOLONGO: I think there is some relevance, so
21 I'll admit it.

22 (General Counsel's Exhibit 43 admitted into evidence.)

23 BY MR. PETERSON:

24 Q After June 24th do you recall participating in
25 other discussions with employees where they brought up

1 their workplace concerns as it related to the Black Lives
2 Matter masks?

3 A I don't recall conversations about workplace
4 concerns with Black Lives Matter masks.

5 Q Do you recall learning that employees were
6 concerned about a lack of consistency in the dress code?

7 A Team members who I spoke to who were out of dress
8 code brought up that.

9 Q They did bring that up?

10 A Mm-hm.

11 THE REPORTER: That was a yes?

12 THE WITNESS: Yes.

13 BY MR. PETERSON:

14 Q Do you recall them bringing up that it was
15 hypocritical of Whole Foods to support the movement and
16 then send home team members for wearing the masks?

17 A I don't remember that exact language.

18 Q Do you recall them requesting a written apology
19 from John Mackey?

20 A I don't recall that either.

21 Q Do you recall it being brought to your attention
22 that they were interested in backpay for days where they
23 were sent home for wearing the Black Lives Matter masks?

24 A I heard that.

25 Q Do you recall it being brought to your attention

1 that they had also wanted a clean slate of points for those
2 being sent home?

3 A I don't recall that being brought directly to my
4 attention.

5 Q Do you recall it being brought indirectly to your
6 attention?

7 A Yes.

8 Q How?

9 A I don't recall, I just remember hearing it.

10 Q Do you recall them bringing up that they wanted
11 the matter brought to the inclusion task force? Do you
12 remember the inclusion task force being brought up?

13 A I do. Yes, I remember the inclusion task force.

14 Q Do you remember what they were requesting
15 regarding the inclusion task force?

16 A I don't remember specifically, no.

17 Q Do you recall them wanting the inclusion task
18 force to have a voice to help make change?

19 A I don't remember exactly what their requests
20 were.

21 MR. PETERSON: Permission to approach the witness with
22 General Counsel's 44?

23 JUDGE SOTOLONGO: Go ahead.

24 (General Counsel's Exhibit 44 marked for identification.)

25 BY MR. PETERSON:

1 Q Let me know when you've had a chance to look that
2 over. There is a second page on the back but there's
3 nothing of substance on it.

4 A I read it.

5 Q And are you copied on that email from --

6 A Yes, sir.

7 Q -- Daniel -- and that's from Daniel Langley?

8 A Yes, sir, it is.

9 Q Do you now recall having the items that are
10 mentioned in that email brought to your attention?

11 A Reading this -- it was addressed to me -- so,
12 yes.

13 MR. PETERSON: Move for the admission of General
14 Counsel's 44.

15 MR. FERRELL: No objection.

16 JUDGE SOTOLONGO: All right. General Counsel's 44 is
17 admitted.

18 (General Counsel's Exhibit 44 admitted into evidence.)

19 BY MR. PETERSON:

20 Q And before you put that away -- do you know --
21 I'm going to ask you about some of the people identified in
22 the email.

23 I think you've talked about Eliza Brown. Do you know
24 who Bill McGowan is?

25 A Yes, sir. He is an executive leader of

1 operations.

2 Q Is he specific to the North Atlantic Region?

3 A Yes, sir, he is.

4 Q And Matthew Renninger?

5 A Matthew Renninger was at that time the store team
6 leader at our Swampscott location.

7 Q You said the Swampscott location?

8 A Yes, sir.

9 Q Is that a -- I'm not from here. Is that a city
10 in Massachusetts?

11 A Yes, sir. It's a city in Massachusetts.

12 Q And James Clancy?

13 A James Clancy was an associate store team leader
14 at our sister store in Fresh Pond, which is in Cambridge,
15 Massachusetts.

16 Q And I realize you didn't send this email but do
17 you know why they would have been included on this email?
18 The store team leader and associate store team leader from
19 the two other stores?

20 A Yes, they were covering shifts at the store.

21 Q Do you recall receiving an anonymous -- well, a
22 letter from the River Street store addressed to whom it may
23 concern about the reasons why they were wearing Black Lives
24 Matter masks?

25 A I remember them writing something out. I don't

1 remember exactly what it said.

2 MR. PETERSON: Permission to approach the witness with
3 General Counsel's 46?

4 JUDGE SOTOLONGO: Go ahead.

5 (General Counsel's Exhibit 46 marked for identification.)

6 (Pause.)

7 BY MR. PETERSON:

8 Q Have you had a chance to look at that?

9 A Yes, sir.

10 Q The first page is an email from Merisa Abotchie
11 to Maureen Cox. Who's Maureen Cox?

12 A That would be the customer service coordinator.

13 Q And can you explain what that position is?

14 A Each program, each department has a regional
15 coordinated team that helps set up the programs and
16 basically helps them set up their department. Gives them
17 direction.

18 Q And in the email it says, "Attached is the letter
19 that was given to Scott." Do you see that?

20 A Yes, sir.

21 Q Is the attachment a letter that was given to you?

22 A It looks like a letter that was given to me.

23 MR. PETERSON: I move for the admission of General
24 Counsel's 46.

25 MR. FERRELL: No objection.

1 JUDGE SOTOLONGO: General Counsel's 46 admitted.

2 (General Counsel's Exhibit 46 admitted into evidence.)

3 BY MR. PETERSON:

4 Q Are you familiar with language in the dress code
5 that states something along the lines of final discretion
6 is in the hands of the local store?

7 A Of the local store, sir?

8 Q Or -- yeah -- yeah, what's your understanding of
9 what discretion is allowed in the dress code.

10 A As far as -- I don't -- who has discretion. Can
11 you repeat that?

12 Q Yeah, I just -- yeah, so in the dress code
13 there's language about the store --

14 Well, I guess my question is, do you recall any -- are
15 you familiar with language in the dress code that gives
16 discretion to the -- give me one second. I'm just going to
17 find it.

18 JUDGE SOTOLONGO: Local store management, regarding
19 variation in dress styles or codes, depending on the
20 locality.

21 THE WITNESS: Is that the question I'm answering?

22 JUDGE SOTOLONGO: Yeah, do you recall there being
23 something in the rule -- in the --

24 THE WITNESS: There is something in it that says there
25 is -- that store team leaders have discretion of the dress

1 code. There is language in there that says that.

2 BY MR. PETERSON:

3 Q There was -- your testimony about Kinzer's
4 discipline and her being on a final warning and then
5 receiving additional attendance points that led to
6 ultimately her termination?

7 A Yes, sir, I testified to that.

8 Q You said -- so when somebody's on a last -- final
9 warning, I think you said any further violations of the GIG
10 would result in termination. Is that right?

11 A Yes, sir.

12 Q And I guess, since -- obviously, Ms. Kinzer had
13 four additional attendance points before getting the
14 separation -- you recall that?

15 A Yes.

16 Q So I guess my question is, so an attendance point
17 isn't considered by itself a violation of the GIG? It --

18 A No, sir.

19 Q It has to reach the level of a warning?

20 A Yes, sir.

21 Q Are you aware of -- in summer of 2020, of any
22 limitations in the dress code about the sizing of logos?

23 A I don't recall, sir.

24 Q Do you recall that the dress code policy was
25 amended in November of 2020?

1 A Yes, I remember there was -- yes.

2 Q Do you recall if that included limitations on the
3 size of logos that employees could wear?

4 A I don't recall exactly what it states.

5 Q You recall something about that being in the --

6 A Yes, sir.

7 Q -- in the dress code?

8 Do you find the phrase "Black Lives Matter"
9 offensive?

10 A No, sir, I do not.

11 Q Your understanding was that employees wanted
12 Whole Foods to not apply the dress code policy to the Black
13 Lives Matter face mask?

14 A Could you repeat that again?

15 Q Yeah. Your understanding was that the employees
16 wanted Whole Foods to stop applying the dress code policy
17 to the Black Lives Matter face masks that they were trying
18 to wear?

19 A Yes, sir, that's my understanding.

20 MR. PETERSON: No further questions.

21 JUDGE SOTOLONGO: Ms. Doherty?

22 MS. DOHERTY: Yes, thank you.

23 CROSS-EXAMINATION

24 BY MS. DOHERTY:

25 Q Hi, Mr. Duncan. It's good to see you.

1 A Good to see you.

2 Q First I want to turn back to General Counsel's
3 Exhibit 3, if you still have a copy of it.

4 A Is that the GIG?

5 JUDGE SOTOLONGO: Three is the big one.

6 THE WITNESS: Yes.

7 JUDGE SOTOLONGO: This one.

8 MS. DOHERTY: Give me a moment so I can find the page
9 to direct you to.

10 Sorry, give me one minute.

11 Thanks for your patience. One more minute.

12 You can put that aside. I'll ask it differently.

13 BY MS. DOHERTY:

14 Q Okay. Earlier in your testimony do you recall
15 testifying that as store team leader you had discretion as
16 to whether to award a point for certain -- tardy for
17 certain reasons, correct?

18 MR. FERRELL: Objection. Misstates the testimony.

19 JUDGE SOTOLONGO: Yeah, I'm not sure that is accurate.

20 THE WITNESS: Can you repeat the question?

21 BY MS. DOHERTY:

22 Q Earlier in your testimony today is it correct
23 that you testified as store team leader you could exercise
24 discretion in awarding a point to a team member if they
25 were late due to inclement weather, for example.

1 A I did not state that I have that power.

2 Q I see.

3 Earlier in your testimony you say that the team
4 lead has discretion to award a point under those
5 circumstances then, is that correct?

6 A No, I did not state that either.

7 Q Would it be a correct statement of the general
8 information guide policy, as of July 2020, that store
9 facility leadership may also, at their discretion,
10 occasionally allow a team member to report late or leave
11 early for good reason, provided there is no consistent
12 pattern of such requests?

13 A I don't recall reading that.

14 Q My question is, do you recall if that was the
15 policy at the time?

16 A As I recall it, the only time points have ever
17 been -- and it was across the board -- is if there was
18 severe inclement weather. I don't ever recall, in a store
19 team leader role, myself ever just forgiving a point or not
20 giving a point. It was Regional's directive.

21 Q All right. Well, in that case let's turn back to
22 General Counsel's Exhibit 3, and it will be page 91 of 158.

23 A I'm sorry, what page was that again?

24 JUDGE SOTOLONGO: Ninety-one, you said?

25 MS. DOHERTY: Yes, please -- 91 of 158.

1 And just let me know when you have found the page,
2 please.

3 THE WITNESS: I'm on the page -- 91.

4 MS. DOHERTY: Great. Thank you.

5 THE WITNESS: Mm-hm.

6 BY MS. DOHERTY:

7 Q So I'd like to direct your attention to the first
8 paragraph -- the last sentence in the first paragraph at
9 the top of the page.

10 A All right. First paragraph. You said the last
11 sentence?

12 Q Yes, please.

13 A "Store facility leadership may also, at their
14 discretion, occasionally allow a team member to report late
15 or leave early for good reason, provided there is no
16 consistent pattern of such request."

17 Q Okay. So is it correct that this was the policy
18 in place as of July 2020?

19 A As I'm reading it in the GIG, yes.

20 Q You can put that aside. Thank you.

21 Mr. Duncan, you recall, don't you, that in the two
22 weeks prior or so to Ms. Kinzer's termination, there was a
23 buzz about the store that she was speaking with an
24 attorney?

25 A I don't recall specifically timelines like that.

1 Q Do you recall a rumor in the store during Ms.
2 Kinzer's tenure there that she was involved with talks with
3 an attorney?

4 A I honestly don't recall.

5 Q Do you recall giving a deposition in the case of
6 Kinzer v. Whole Foods Market on August 17, 2021?

7 A Yes, I recall --

8 Q Okay.

9 A -- deposition.

10 Q And do you recall me asking you a question of
11 whether you had any conversations with other store leaders
12 or anyone in regional leadership about concerns that
13 Savannah or maybe another team member might bring a lawsuit
14 against Whole Foods related to these protests?

15 MR. FERRELL: Objection. What's the relevance of
16 this? There's no allegation of retaliation. Where are we
17 going with this?

18 JUDGE SOTOLONGO: That is correct, Ms. Doherty, there
19 is no Section 81 or 83 or 84 that alleges that Ms. Kinzer
20 was retaliated against by employer for bringing either a
21 lawsuit, or Board charges, for that matter.

22 MS. DOHERTY: Yes, I understand, Your Honor. There
23 has been some testimony about her termination and informing
24 Mr. Duncan of the charges that she brought, which I'm
25 trying to explore. I do think it's also relevant if Whole

1 Foods management had knowledge that the employees,
2 including Ms. Kinzer, were viewing the discipline of Black
3 Lives Matter masks as discrimination in the workplace,
4 which would go towards their understanding of Black Lives
5 Matter messaging being related to their working terms and
6 conditions.

7 JUDGE SOTOLONGO: But wasn't the lawsuit brought as a
8 result of the employer having denied employees their use of
9 Black Lives Matter -- in other words, it seems to me that
10 you're bootstrapping, you are bringing something that
11 occurred afterwards to make the arguments -- somehow -- as
12 I understand it, to make the argument that employees were
13 able -- or, should have been able or at least to -- or, to
14 wear -- or, that their wearing Black Lives Matter initially
15 was protected activity, by the fact that later on they
16 brought a lawsuit against the employer -- it seems to me
17 like bootstrapping. You're taking something that happened
18 afterward. So I don't see where this is going.

19 MS. DOHERTY: Sure. I mean, well, the protests did
20 occur over a period of time, and we have had testimony
21 about the evolution of employees' demands, including
22 amending the dress code to permit Black Lives Matter
23 messaging. I don't intend to belabor the point, I only
24 have a couple questions as to Mr. Duncan's knowledge of
25 rumors around the stores that employees were considering.

1 JUDGE SOTOLONGO: Okay. I'll give you some leeway,
2 but I don't find that all that relevant -- the fact that at
3 some point Mr. Duncan or some of the other managers may
4 have had an inkling or feared or been concerned about the
5 fact that Ms. Kinzer or some of the others may have --
6 bringing a lawsuit against the company. I don't see how
7 that addresses the issues in this particular case. Whether
8 it's maybe relevant to the District Court proceedings, I do
9 not know, but I don't see that -- much relevance to these
10 proceedings.

11 MR. FERRELL: Your Honor, if I might. I think Your
12 Honor has already granted counsel as much leeway as she
13 really ought to be entitled to on this line of questioning.
14 I mean, the issue in the complaint is whether the wearing
15 of the Black Lives Matter messaging -- on mask or buttons
16 or whatever -- in the store was protected activity. And it
17 either was or it was not on June 24, the first day it was
18 worn in River Street store.

19 JUDGE SOTOLONGO: Whether the rules that prohibits the
20 wearing of such masks are lawful (unclear), yes.

21 MR. FERRELL: Right.

22 JUDGE SOTOLONGO: No, I agree. I can't see the
23 relevance of this, Ms. Doherty.

24 MS. DOHERTY: Well, Your Honor, it does also go to the
25 witness's credibility and reading excerpts from his

1 deposition testimony -- I would just like some leeway to
2 ask a few more questions.

3 JUDGE SOTOLONGO: I don't see how it goes to his
4 credibility. It's -- the fact that he doesn't recall now
5 being -- having concerns about a possible lawsuit is going
6 to impact his testimony about the other things that he's
7 testified about.

8 MS. DOHERTY: Okay. Well, I understand --

9 JUDGE SOTOLONGO: You can make your offer --

10 MS. DOHERTY: -- Your Honor's --

11 JUDGE SOTOLONGO: -- of proof but I don't think this
12 is a relevant inquiry at this point. You can make your
13 offer of proof.

14 MS. DOHERTY: No, I understand and respect Your
15 Honor's ruling. I would like some -- I do have a few
16 questions related to the day of Ms. Kinzer's termination.

17 JUDGE SOTOLONGO: Okay. You can proceed.

18 MS. DOHERTY: Thank you.

19 BY MS. DOHERTY:

20 Q Okay. As we've -- you testified today a bit
21 regarding the events of July 18th, when Ms. Kinzer was
22 separated. Do you recall that?

23 A I recall what I said today, yes.

24 Q Okay. You didn't fire Ms. Kinzer as soon as she
25 arrived at the store that day, right?

1 A No, I did not.

2 Q You first called Team Member Services and had a
3 conversation with Mr. Zito about firing her, right?

4 A Yes.

5 Q And then some time passed while you waited for a
6 call back, isn't that correct?

7 A Yes.

8 Q What time did you fire Ms. Kinzer on July 18th?

9 A I don't remember off the top of my head.

10 Q Does 2 p.m. sound correct?

11 A Again, I don't remember off the top of my head.

12 Q Do you recall if it would be closer to 2 p.m. or
13 4 p.m.?

14 A I don't recall off the top of my head.

15 Q And you recall, don't you, that Ms. Kinzer sent
16 you by email copies of charges that she had filed with the
17 EEOC and NLRB against Whole Foods, correct?

18 A Yes, she did email me that.

19 Q What time did she send you copies of those
20 documents?

21 A I don't recall off the top of my head. It was
22 not after she was late for work. I don't remember what
23 time she came in but it wasn't immediately when she got
24 there.

25 Q Is it correct that it was prior to her

1 termination?

2 A I don't recall that. I don't recall that. I
3 know that during -- I know, in the same meeting, we
4 discussed it. I don't know which one happened. I don't
5 recall that being before.

6 Q It wasn't a couple hours prior to giving her her
7 termination notice?

8 A I honestly don't recall.

9 Q Okay.

10 MS. DOHERTY: Permission to approach the witness, Your
11 Honor?

12 BY MS. DOHERTY:

13 Q Okay. Mr. Duncan, I handed you a document that
14 I've marked Charging Party Exhibit 1.

15 (Charging Party's Exhibit 1 marked for identification.)

16 BY MS. DOHERTY:

17 Q Could you turn to the second page, please? It's
18 double-sided.

19 MR. FERRELL: Your Honor, I'm going to object to the
20 exhibit. I thought we covered this with the objection a
21 moment ago.

22 JUDGE SOTOLONGO: So, Ms. Doherty, again, I don't --
23 well, I haven't heard your question, so -- before you
24 object, but it seemed to me that you're trying to show that
25 Mr. Kinzer -- excuse me -- that Mr. Duncan had been advised

1 by Ms. Kinzer via email prior to her term -- prior to the
2 time that she was actually informed that she was being
3 discharged that she -- and perhaps others -- had filed a
4 charge -- I guess -- this would be the EEOC, I guess.

5 And I don't see how this supports any of the
6 allegations of this complaint. Assuming that this is true
7 -- I assume this is true, that -- even assuming that in
8 fact Mr. Duncan was aware prior to informing Ms. Kinzer
9 that she was being discharged -- if he was aware that she
10 had filed charges with the EEOC, I don't see how that
11 supports any of the allegations of the complaint. Again,
12 there's no allegation in this complaint that her
13 termination was because of a retaliatory motive by the
14 employer based on her having filed charges with the EEOC or
15 the NLRB, or any other agency for that matter.

16 So I don't -- I'm not sure where this is going.

17 MS. DOHERTY: Understand, Your Honor. This is -- the
18 last couple questions, there has been some testimony as to
19 what happened the day that Ms. Kinzer was terminated. This
20 email provides a timestamp, and I just wanted to introduce
21 it to refresh the witness's recollection so he could recall
22 when the information was provided to him.

23 JUDGE SOTOLONGO: I just don't see the relevance. I
24 really don't.

25 I mean, maybe Ms. Kinzer, during her testimony --

1 because as I recall, you know, Ms. Kinzer sometimes -- her
2 answers were sort of long at times -- a bit narrative of
3 what was happening. It may be that she may have mentioned
4 as part of her testimony that in fact she did inform Mr.
5 Duncan -- and perhaps some of the other managers -- the
6 fact that she had filed a charge before she was terminated.

7 But assuming that's true -- I don't think that has
8 been disputed. Number one. And number two, it just
9 doesn't support any of the allegations of this complaint.

10 I don't know whether it may support a retaliation
11 charge with the EEOC. That's, you know, their business but
12 it's not before me, it's not before us here.

13 MS. DOHERTY: I understand, Your Honor. As I said
14 earlier, there has been testimony from both Mr. Duncan and
15 Ms. Kinzer regarding her termination. We have explored the
16 accumulation of points at some length in the testimony. So
17 I am just trying to clarify some of Mr. Duncan's testimony.

18 JUDGE SOTOLONGO: Well, but -- let's put it this way.
19 To the extent that Ms. Kinzer may have testified, I don't
20 think it became the subject of any cross-examination or any
21 dispute, as I recall. And therefore it's not something
22 that needs to be rebutted. A, because it wasn't really
23 denied, number one. And number two, even if it was, it's
24 really -- again, it doesn't support any of the underlying
25 charges of the complaint.

1 MS. DOHERTY: Understood, Your Honor.

2 JUDGE SOTOLONGO: Okay. So I don't think this is
3 relevant, quite frankly.

4 MS. DOHERTY: Well, those are my remaining questions
5 are regarding this document, so --

6 JUDGE SOTOLONGO: You can put it in the rejected
7 exhibit file, and if you want to bring it to the Board's
8 attention, I have no problem with you bringing it up. I
9 mean, obviously, it will go into rejected exhibit file.
10 (Charging Party's Exhibit 1 rejected.)

11 MS. DOHERTY: Okay.

12 JUDGE SOTOLONGO: All right.

13 MS. DOHERTY: All right. I have no further questions
14 for Mr. Duncan. Thank you.

15 JUDGE SOTOLONGO: All right. I have some questions.
16 And, obviously, to the extent that my questions cause or
17 result in you having additional questions that you weren't
18 planning to, by all means, then you're --

19 Mr. Duncan, do you recall, during the meetings that
20 you had with either Ms. Kinzer and/or the other employees
21 who had been wearing masks -- the Black Lives Matter masks
22 -- when you inform -- in some cases -- or, if I understand
23 your testimony, in some cases they're a one-to-one meeting
24 -- you with employee -- correct?

25 THE WITNESS: Yes.

1 JUDGE SOTOLONGO: In some other cases it was you and
2 two or perhaps three other employees. Would that be
3 correct?

4 THE WITNESS: That is correct, sir.

5 JUDGE SOTOLONGO: All right. In any of those
6 instances, either in your individual meetings with these
7 employees or your, quote, group meetings with these
8 employees, do you recall any discussion about why -- the
9 message Black Lives Matter in itself was controversial or
10 why the employer was -- had chosen not to allow this
11 message?

12 Besides the fact that it was, quote, against the
13 rules.

14 THE WITNESS: There was no other language brought to
15 my attention other than it was out of dress code.

16 JUDGE SOTOLONGO: All right. Let me be a little more
17 specific. Do you recall any discussion -- you making a
18 statement to them that the reason -- or, one of the reasons
19 why this message was against the rules was because it was,
20 quote, political or, quote -- in nature.

21 THE WITNESS: Did it come up in discussion? It came
22 up in discussion, that it was --

23 JUDGE SOTOLONGO: Okay. Do you recall who brought
24 that up?

25 THE WITNESS: It was brought up -- multiple team

1 members.

2 JUDGE SOTOLONGO: Okay. Did you ever tell any of
3 these employees -- either individually or as a group --
4 that the reason that the employer -- the Whole Foods had
5 decided that this was not okay was because the message was
6 itself, quote, political in nature?

7 THE WITNESS: I don't recall saying that someone from
8 Whole Foods Market told me that we can't let team members
9 wear Black Lives Matter masks because it is too political.

10 JUDGE SOTOLONGO: Okay. You don't recall saying that,
11 but do you recall that that came -- that you may have said
12 -- well, this message is not like -- instead of wearing a
13 Red Sox thing, because that's not political, where this is,
14 for example -- anything like that?

15 THE WITNESS: I don't recall specifically saying like
16 that. I say, we don't let any messaging come into the
17 store that someone may not agree with. I did say those
18 words. "Someone may not agree with."

19 JUDGE SOTOLONGO: Okay. And then could the word --
20 was the word "political" used in that context?

21 THE WITNESS: I don't recall saying it in that
22 context.

23 JUDGE SOTOLONGO: Okay. Now, would it be fair to say
24 that in June 2020, when these events took place, that there
25 was no specific rule about messaging in masks, because up

1 until that point nobody had been wearing masks, is that
2 correct? People started wearing --

3 THE WITNESS: Prior to the SOP coming out of the mask
4 mandate?

5 JUDGE SOTOLONGO: Yes.

6 THE WITNESS: Yeah, no one was wearing masks.

7 JUDGE SOTOLONGO: Right, no one was wearing -- so, in
8 a sense, this was a new event. People started wearing --
9 places started wearing masks, I guess, in April of 2020, in
10 response to the pandemic, so --

11 THE WITNESS: Yes.

12 JUDGE SOTOLONGO: -- nobody had thought about
13 addressing the issue of messaging and masks, because this
14 was a new thing. And so the rules specifically did not
15 address that issue. Would that be correct to say?

16 THE WITNESS: Yes. As I understand it.

17 JUDGE SOTOLONGO: Okay. So -- because before nobody
18 would wear a mask, unless they were robbing the store, of
19 course.

20 Right?

21 THE WITNESS: Righteous.

22 JUDGE SOTOLONGO: So -- all right.

23 THE WITNESS: That would be scary.

24 JUDGE SOTOLONGO: But later on -- right. So later on
25 -- later, at some point, it's my understanding that the

1 rules were amended or modified to specifically address
2 messaging and masks, is that -- would that be correct?

3 THE WITNESS: Messaging and masks and just overall
4 dress code in general --

5 JUDGE SOTOLONGO: Right.

6 THE WITNESS: -- yes.

7 JUDGE SOTOLONGO: Okay. All right. Those were my
8 questions.

9 Then, Mr. Ferrell, ball's back in your court.

10 MR. FERRELL: Very well. Just one second, Your Honor.
11 Just a couple questions, Your Honor.

12 JUDGE SOTOLONGO: Okay.

13 REDIRECT EXAMINATION

14 BY MR. FERRELL:

15 Q Scott, the first time you spoke to Jamie Zito and
16 TMS on June 24, 2020 about the question of "how do I
17 interpret Black Lives Matter messaging on face masks,"
18 right?

19 A Yes.

20 Q You recall that?

21 A The call? Yes, I remember calling him.

22 Q And the answer you got back from when he called
23 you back is, it's out of dress code.

24 A Yes, sir.

25 Q And on your earlier testimony we looked at the

1 mask SOP that you just referenced.

2 A Yes, sir.

3 Q So I want to call that up --

4 Which General Counsel exhibit is that? Hold on
5 one second.

6 General Counsel's 4. Do you have General
7 Counsel's 4 still in front of you?

8 A Yes, sir.

9 Q And General Counsel's 4 is the one -- I think,
10 referenced just a moment -- went into effect in April of
11 2020?

12 A Yes.

13 Q Is that right?

14 A Yes, sir.

15 Q And on page 3 of 7 -- on number 7, that's the
16 first time that anything had come out that addressed face
17 mask as under the dress code, right?

18 A Yes, sir.

19 Q And there on page 3 of 7, in General Counsel's 4,
20 it says that "mask must adhere to Whole Foods dress code as
21 outlined in the GIG," right?

22 A Yes, sir, that's what it says, sir.

23 Q So I guess, when the issue came up there was
24 guidance that was out there already that masks -- the dress
25 code applies to masks, right?

1 A Yes, according to SOP, yes, sir.

2 Q You just had not had the question come up to you
3 before about what about a specific message on a mask?
4 "Somebody's actually doing it in the store, what do I do
5 with it."

6 A Yes, sir, that's correct.

7 Q And if you're working on the language of that --
8 what was a new SOP at the time -- it came out in April --
9 back on the page 3, it talks about "any mask or protective
10 equipment must be without any visible slogan, message, logo
11 or advertising," right?

12 A That is correct.

13 MR. FERRELL: No further questions, Your Honor.

14 JUDGE SOTOLONGO: What were you reading from, Mr.
15 Ferrell? You lost me for a second there.

16 MR. FERRELL: Oh, I'm sorry. It's General Counsel's
17 Exhibit 4.

18 JUDGE SOTOLONGO: Okay.

19 MR. FERRELL: The face mask SOP. It's page 3 of 7.

20 JUDGE SOTOLONGO: Right.

21 MR. FERRELL: It's the second bullet up from the
22 bottom, under number 7. Begins "homemade or reusable cloth
23 mask" --

24 JUDGE SOTOLONGO: I see it. Okay, I see it. All
25 right, okay. I was just -- okay. I was just looking in

1 the wrong place. Thank you very much.

2 All right. General Counsel?

3 MR. PETERSON: Nothing further.

4 JUDGE SOTOLONGO: Ms. Doherty?

5 MS. DOHERTY: Nothing, thank you.

6 JUDGE SOTOLONGO: All right. Mr. Duncan, you're
7 excused. Please do not discuss your testimony with any
8 witness or potential witness in this matter until this
9 whole case is over. And thank you for your testimony.

10 THE WITNESS: Do I leave these documents here?

11 MR. FERRELL: You can leave the documents but take
12 your water bottle.

13 THE WITNESS: I'm all set?

14 MR. FERRELL: You're good. Don't forget your coat.

15 THE WITNESS: Is that door locked?

16 MALE: No.

17 MR. FERRELL: I don't think it's closed. It's locked
18 if it's closed, so let us know, but I don't think it's
19 closed.

20 THE WITNESS: Okay. Thank you.

21 MR. FERRELL: Thank you.

22 JUDGE SOTOLONGO: Okay. Is that it for the day?

23 MR. FERRELL: That is it for the day, Your Honor.

24 JUDGE SOTOLONGO: No additional witness at this point,
25 I assume?

1 MR. PETERSON: Correct.

2 JUDGE SOTOLONGO: Well, okay. Well, I guess we finish
3 a little earlier than anticipated, which is good.

4 All right. Well, as we --

5 Somebody's eager to come back.

6 MR. FERRELL: He might be locked out.

7 JUDGE SOTOLONGO: Let's go off the record.

8 [OFF THE RECORD]

9 [ON THE RECORD]

10 JUDGE SOTOLONGO: Let's go back on the record.

11 All right. We're back on the record. All right.

12 It appears that we have concluded our proceedings here
13 in Boston, for the time being. As we have previously
14 discussed, there are two additional witnesses -- one for
15 the General Counsel and one for the Respondent -- that are
16 going to be testifying virtually via Zoom, the dates to be
17 determined. I'll let the parties decide, after
18 consultation between them, as to what dates.

19 Obviously, it would be great if we can do both on the
20 same day. If not, we'll just have to do it on consecutive
21 days or whatever. My schedule's pretty much open for the
22 next three to four weeks. Since I anticipated being here
23 next week anyway, I had left that open for that
24 possibility. So, obviously, I think the sooner we can do
25 it, the better, so let me know when you have reached an

1 agreement concerning the date or dates for these
2 appearances.

3 And, again -- and just to remind you, Mr. Peterson,
4 for General Counsel, obviously, regarding your witness, you
5 will have to provide the Respondent with the documents that
6 they requested pursuant to the subpoena, which I had
7 quashed, with a proviso that if that person was called as a
8 witness to testify that Respondent should get 48 hours'
9 notice and be provided with the documents that they have
10 subpoenaed. So, obviously, you need to do that if that
11 person is to testify.

12 And I guess -- unless there's anything else that you
13 need to bring up, I think that will wrap it for us. I
14 guess I'll be seeing you -- hopefully, I'll be seeing you
15 in Philadelphia in June, unless this nasty virus starts
16 acting up again, which it appears to be at this point.

17 MR. BROWN: Don't say it.

18 JUDGE SOTOLONGO: Yeah, I know. I know, we're still -
19 - I mean, we're still basically four weeks away from our --
20 a month away from our initial week in Philadelphia.
21 Hopefully things will have changed for the better. If not,
22 if things take -- we will have to decide, obviously,
23 whether a further -- amending a further variation from our
24 schedule may be necessary in view of the pandemic, as I
25 left it open in my order when I approved the schedule you

1 proposed -- it was always contingent upon, you know, things
2 on the ground being permitted -- permitting our appearance
3 in person. And right now that is becoming an issue of
4 concern. I think, at this point there's no reason to alter
5 or cancel the in-person appearances in Philadelphia but we
6 have to keep our eye on it, obviously. So, obviously, my
7 preference still to do in-person hearings, circumstances
8 permitting.

9 In any event, thank you very much for your
10 cooperation. And like I said, hopefully I'll be seeing you
11 all in a week or two via Zoom and later in person in
12 Philadelphia.

13 All right. Thank you. The hearing -- the record is
14 closed for today.

15 (Whereupon, at 1:47 p.m., the hearing in the above-
16 entitled matter was recessed to reconvene in the future.)
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CERTIFICATION

This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 1, in the matter of Whole Foods Market Services, Inc., Case Nos. 01-CA-263079, 01-CA-263108, 01-CA-264917, 01-CA-265183, 01-CA-266440, 01-CA-273840, 04-CA-262738, 04-CA-263142, 04-CA-264240, 04-CA-264841, 05-CA-264906, 05-CA-266403, 10-CA-264875, 19-CA-263263, 20-CA-264834, 25-CA-264904, 32-CA-263226 and 32-CA-266442, at Boston, Massachusetts, on May 10, 2022, was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the recording from the hearing, that the exhibits are complete and no exhibits received in evidence or in the rejected file are missing.



Catherine Burns

Notary Public

My commission expires:

July 28, 2028